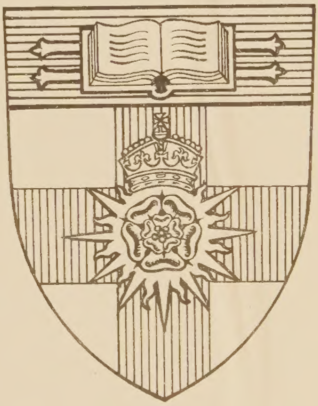
~~PR LH3 Annual~~

DEPOSITORY

SHL
WITHDRAWN



UNIVERSITY OF LONDON
LIBRARY

AIII 345/5-6

Digitized by the Internet Archive
in 2026

https://archive.org/details/international-law-reports_1951

INTERNATIONAL LAW REPORTS

1951

INTERNATIONAL LAW REPORTS

1950. 70s. net. 1951. 80s. net.
1952. 80s. net.

Editor: Sir Hersch Lauterpacht, Q.C., LL.D., F.B.A.

Published by
BUTTERWORTH & CO. (Publishers), LTD.

Previous Volumes published under the title:

ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES

1919 to 1922. 45s. net. 1923 and 1924. 42s. net.

Editors: Sir John Fischer Williams, C.B.E., K.C., and H. Lauterpacht, LL.D.

1925 and 1926. 35s. net. 1927 and 1928. 42s. net.

Editors: Arnold D. McNair, C.B.E., LL.D., and H. Lauterpacht, LL.D.

1929 and 1930. 42s. net.

Editor: H. Lauterpacht, LL.D.

(*The above volumes are out of print at present*)

Published by
LONGMANS, GREEN & CO., LTD.

1931 and 1932. 40s. net. 1933 and 1934. 42s. net.
1935 to 1937. 50s. net. 1938 to 1940. 55s. net.
1941 and 1942. 55s. net.
1919 to 1942 (Supplementary Volume). 55s. net.
1943 to 1945. 55s. net. 1946. 55s. net.
1947. 55s. net. 1948. 70s. net.
1949. 70s. net.

Editor: H. Lauterpacht, Q.C., LL.D., F.B.A.

Published by
BUTTERWORTH & CO. (Publishers), LTD.

AFRICA: BUTTERWORTH & CO. (AFRICA), Ltd.
DURBAN: 33/35 Beach Grove
AUSTRALIA: BUTTERWORTH & CO. (AUSTRALIA), Ltd.
SYDNEY: 8 O'Connell Street
MELBOURNE: 430 Bourke Street
BRISBANE: 240 Queen Street
CANADA: BUTTERWORTH & CO. (CANADA), Ltd.
TORONTO: 1367 Danforth Avenue
NEW ZEALAND: BUTTERWORTH & CO. (AUSTRALIA), Ltd.
WELLINGTON: 49/51 Ballance Street
AUCKLAND: 35 High Street

INTERNATIONAL LAW REPORTS

YEAR 1951

EDITED
BY
SIR HERSCH LAUTERPACHT, Q.C., LL.D., F.B.A.
JUDGE OF THE INTERNATIONAL COURT OF JUSTICE;
BENCHER OF GRAY'S INN; MEMBER OF THE INSTITUTE
OF INTERNATIONAL LAW

LONDON
BUTTERWORTH & CO. (PUBLISHERS), LTD.
1957

PRINTED IN GREAT BRITAIN

BIBL.
LONDIN.
UNIV.

ADVISORY COMMITTEE

Lord McNAIR, Q.C., LL.D., F.B.A. (Chairman)
Professor EDWIN D. DICKINSON
Sir GERALD FITZMAURICE, K.C.M.G.
Professor EDVARD HAMBRO
Sir CECIL J. B. HURST, G.C.M.G., K.C.B., Q.C., LL.D.
Professor R. Y. JENNINGS
Dr. YUEN-LI LIANG
M. JULIO LÓPEZ OLIVÁN
Professor CHARLES ROUSSEAU
Professor J. H. W. VERZIJL
Professor C. H. M. WALDOCK, C.M.G., O.B.E., Q.C.

CONTRIBUTORS

International Court of Justice International Arbitral Tribunals	The Editor
Franco-Italian Conciliation Commission	Mr. A. B. Lyons
Administrative Tribunals of the United Nations and the International Labour Organization	M. Jacques Lemoine
Austria	Professor I. Seidl-Hohenveldern *and* Dr. F. Honig
British Colonies : Hong Kong Singapore Malaya	Mr. D. J. Latham Brown
Canada Union of South Africa	Mr. J. F. Scott
Denmark	Mr. C. A. Norgaard
Egypt	Dr. J. Mervyn Jones
Eire Great Britain	Professor R. Y. Jennings

France	Dr. Felice Morgenstern
Belgium	
Switzerland	
Germany	Dr. F. Honig
Holland	Professor J. H. W. Verzijl
India	Mr. D. J. Latham Brown
Pakistan	
Israel	Mr. S. Rosenne
Italy	Mr. Clive Parry
Latin-American Countries :	Professor Alona E. Evans
Argentina	
Chile	
Mexico	
Peru	
Venezuela	
Luxemburg	Dr. P. Pescatore
Norway	Professor E. Hambro
Philippines	Professor R. R. Baxter *and* Mr. Ernest L. Kerley
Sweden	Dr. Emil Sandstroem *and* Dr. Hans Blix
United States of America :	
(Supreme Court decisions)	Professor William Tucker Dean
(Federal and State Courts)	Mr. S. M. Schwebel

PREFACE

to the volumes for the years 1951 and 1952

THE present volume of the *International Law Reports*, covering the year 1951, as well as the accompanying volume which covers the year 1952 and which is being published simultaneously, continue the policy of reproducing verbatim—and, wherever relevant, in full—the decisions of international and municipal courts. In some cases, the policy of giving a full account of the legal issues involved has prompted the inclusion of a detailed report of the decisions of inferior courts—even if, on occasions, subsequently overruled by a higher tribunal. With regard to the Judgments and Opinions of the International Court of Justice, it has been decided to report them in full, subject to the omission of the purely formal parts of the pronouncements of the Court. The same—or almost the same—policy has been followed with regard to Dissenting and Separate Opinions. A further innovation, which figures prominently in these two volumes, is the decision to report in some detail the awards of the Administrative Tribunals of the United Nations and the International Labour Organization. Whether given the name of international administrative law or not, the law resulting from the interpretation of contracts of service between international public organizations and their officials cannot be regarded as being outside the scope of modern international law. For similar reasons it is intended in the future to include decisions of a general character issuing from tribunals and other organs, of a legal character, of international public organizations such as the Court of the European Coal and Steel Community. Finally, it has been decided to include in the present two volumes now being published and in future volumes such decisions of Conciliation Commissions as contain a legal element and purport to be based on law. Thus these two volumes include a number of decisions given by the Franco-Italian Conciliation Commission.

Like their predecessors, the present two volumes show some apparent omissions inasmuch as there are a number of countries from which no decisions are reported. These omissions are not due to any failure on the part of the Editor to do his best to make the *International Law Reports* as representative and complete as possible. The attempts to achieve that end have not always been successful--one of the reasons being that it often happens that in a particular country no decision bearing upon international law has been rendered throughout the year or series of years covered by the volume in question. But there may also be other reasons—in which case the omission need not be irretrievable. For while the purpose of each volume of the *International Law Reports* is to cover a particular year, there is no good reason why there should not be included cases which were decided in a previous year but which have been omitted owing to oversight, inaccessibility, or the difficulty of finding a contributor willing to undertake an onerous and often unrewarding task. I shall be grateful if my attention is drawn to any cases which have not been reported but which ought to be included and of which a report can be made available. They can, without inconvenience, be included in a future volume.

The Classification which appears at the commencement of this volume has been revised and brought up to date. It is intended in the future to include the Classification in every volume.

In addition to the present two volumes, arrangements have been made to publish in the course of the present year volumes for 1953 and 1954. If these arrangements materialize, the existing gap between the years reported and the year of publication will be considerably reduced. For reasons which will be apparent, some gap there must always remain, but the attempt now being made to bring the *International Law Reports* up to date, so far as possible, is bound to increase their usefulness considerably. That effort—as, indeed, the very continuation of the *International Law Reports*—has been made possible through the generosity of the Ford Foundation, and the Advisory Committee and the Editor avail themselves of this opportunity of giving expression to their grateful appreciation of the very substantial help received from the Foundation.

They also record their thanks for the grant received from the Trustees of the International Law Fund in the United Kingdom.

I am glad, once more, to record my deep gratitude to the contributors for their exacting labours, especially in cases in which the preparation of the reports entails translation into English. Theirs is a selfless task, discharged in the best tradition of service, and I only hope that they will find some compensation in the thought that the *International Law Reports* have, thanks to them, become an indispensable tool for the study, the teaching and the practice of international law. In addition to previous contributors I have been fortunate in enlisting the co-operation of M. Jacques Lemoine in respect of the decisions of the Administrative Tribunals of the United Nations and the International Labour Organization; Mr. A. B. Lyons in respect of the Franco-Italian Conciliation Commission; Mr. A. D. Watts for various countries of the British Commonwealth of Nations; Mr. Clive Parry for Italy (a task involving particularly exacting labours of translation); Professor Masao Ichimata for Japan; Dr. S. Sucharitkal for Thailand; and, last but not least, Professor R. R. Baxter, of the Harvard Law School, and Mr. S. M. Schwebel, who, by taking over the reports of the State and Federal Courts in the United States of America, have substantially lightened the burden of Professor William Tucker Dean. Professor Baxter, together with Mr. E. L. Kerley, has also been responsible for the preparation of the reports from the Philippines. Moreover, he and Mr. Schwebel have helped in very many other ways. To all of them I am deeply grateful.

Lord McNair, as Chairman of the Advisory Committee, has —as always—given me the benefit of his counsel and assistance in all matters. I have been encouraged throughout by the knowledge that, as one who was Joint Editor of what was then the *Annual Digest of Public International Law Cases*, he shares my views as to the usefulness of this publication.

I am much indebted to Mrs. Gladys Lyons, B.Sc. (Econ.), for efficient and scholarly assistance in reading the two volumes for the press and for going through the proofs of these volumes, for preparing the Tables of Cases of the volume for 1952 and, with the help of Mr. A. B. Lyons, the Indexes of both volumes. My thanks are also due to Mrs. E. E. Jansen for able secretarial assistance and for preparing the Tables of Cases of the volume for 1951.

I am indebted to Messrs. Butterworth & Co., the Publishers, for their co-operation, as well as to the Printers, Messrs. R. & R. Clark in respect of the volume for 1951 and Messrs. R. J. Acford in respect of the volume for 1952, for their efficiency and courtesy.

H. LAUTERPACHT

CAMBRIDGE
January 1957

TABLE OF CONTENTS

[See also CLASSIFICATION]

PAGE

PREFACE vii

TABLE OF CASES REPORTED (alphabetical) . xiii

TABLE OF CASES REPORTED (arranged according to countries) xix

TABLE OF CASES CITED xxv

LIST OF ABBREVIATIONS xxix

CLASSIFICATION xxxiii

PART I

INTERNATIONAL LAW IN GENERAL . . 1

PART II

STATES AS INTERNATIONAL PERSONS . . 17

PART III

STATE TERRITORY 79

PART IV

JURISDICTION 171

PART V

STATE RESPONSIBILITY . . . . —

PART VI

THE INDIVIDUAL IN INTERNATIONAL LAW . 236

PART VII

PAGE
Diplomatic and Consular Intercourse and Privileges 347

PART VIII

Treaties 361

PART IX

International Organization and Administration 441

PART X

Disputes 470

PART XI

War and Neutrality 473

Index 731

TABLE OF CASES REPORTED

(ALPHABETICAL)

(The figures in heavier type indicate the page numbers of the actual reports or digests. The ordinary type indicates the pages containing the relevant cross-references.)

A., *In re*, **324**
Aarau and Altenrhein (Communes of) *v.* Noger, **293**
Abdou *v.* Attorney-General of Kenya, **282,** 309
Aboitiz & Co. *v.* Price, **592,** 532, 544, 567
Abu Dhabi Arbitration : *see* Petroleum Development Ltd. *v.* Sheikh of Abu Dhabi
Ahmed *v.* Military Governor, Galilee, **264**
Ali Hamud *et Al.* *v.* Minister of the Interior, **264**
American Business Machines Corporation *v.* Onderlinge Oorlogsschadeverzekering Maatschappij, **473,** 701
Anciens Établissements Graf Frères *v.* Société La Mure, **678,** 701
Anderson *v.* Speyer, **219**
Andres and Herminia Pichay *v.* Rosario Mata *et Al.*, **661**
Andresens Bank and Bergens Privatbank *v.* Norges Bank, **685**
Anglo-Norwegian Fisheries Case, **86,** 1, 164
Araneta *v.* Alva J. Hill, **661**
Artaza, *In re*, **333**
Asia Trading Co., Limited *v.* Biltimex, **433**
Association for the Protection of Palestine Government Bondholders *v.* Minister of Finance of Israel, **398**
Attorney-General *v.* Enigster, **540**
Attorney-General *v.* Levitan, **64**
Attorney-General *v.* Tarnek, **539**
Attorney-General of Israel *v.* El-Turani, **164,** 23, 79, 469
Aubert *et Al.* *v.* Secretary-General of the United Nations, **450**
Austrian Amnesty Case, **632**
Austrian Nationality Case, **248**
Austro-German Extradition Case, **330**
Avenol *v.* Pensions Fund of the League of Nations, **456,** 468
Az. Comm. Ital. Carboni *v.* Meiorini, **84**

Bäcker *v.* Austrian Federal Treasury, **698,** 14
Badawi *v.* Military Governor, Galilee, **264**
Bank voor Handel en Scheepvaart N.V. *v.* Slatford and Another, **171,** 246, 250, 440, 520, 530, 565
Banque des Marchands de Moscou (Koupetschesky) *v.* Kindersley and Another, **189**
Baque *v.* Agusty, **435**
Barrabini, *In re*, **507,** 265
Beck, *In re*, **537**
Belgium (State of) *v.* Ramioul, **544**
Benzoni *v.* Davidovici, **392**
Bertrand, Mannès and State of Belgium *v.* Bontemps, Camus and Ramelot, **683,** 701
Bertuzzi *v.* Éts. Santarelli Frères, **290**
Bhagwan Shankar *v.* Rajarum Bapu, **69,** 72
Booty (Determination of Ownership) Case, **620**
Booty (Requisitioned Car) Case, **699**
Bour *v.* Bour, **609**
Braunstein's Estate, *In re*, **79**
Bugsier Reederei- und Bergungs-Aktiengesellschaft *v.* Owners of s.s. *Brighton*, **509**

C.E.A.T. *v.* Società Hungaria, **81**
Cabet de Chambine *v.* Bessis, **51**
Capitol Records *v.* Mercury Record Corp., **570**
Caravas' Estate, *In re*, **493,** 492
Central States Power & Light Corp. *et Al.*, *In re*, **570**
Chammas *v.* Ministry of the Interior, **429,** 398, 399
China (Republic of) *v.* Pang-tsu Mow *et Al.* : *see* Republic of China, etc.
Christen *v.* Onderlinge Oorlogs-Molestverzekerings-Maatschappij, **681**
Cities Service Company *v.* McGrath, **513,** 206, 566, 567
Cobb *v.* United States, **549,** 677
Collision in the Baltic Case, **40,** 69
Colombia *v.* Peru ; *see* Haya de la Torre Case
Communes of Aarau and Altenrhein *v.* Noger, **293**
Compagnie des Wagons-Réservoirs *v.* Ministry of Industry and Commerce and Italian Railways, **394**
Compulsory Grant of German Nationality Case, **247**
Confiscation of Machine (Germany) Case, **199**
Criminal Files (Greece) Case, **629**
Custodian of Enemy Property *v.* Grunert, **263**

Daem, *In re*, **395,** 14, 334
D'Amico, *In re*, **246**
D'Aquino *v.* United States, **276**
De Asis *v.* José B. Feliciano, **661**
De Belarmino (Plácida Clemente and Mauro) *v.* Pedro de Mesa, **661**
De Guise (Duc) Claim, **423**
Del Rosario *et Al. v.* Carlos Sándico *et Al.*, **661**
"Der Güternahverkehr" *v.* Seidl, **203,** 40
Desplanques *v.* Pensions Fund of the League of Nations, **460**
Dickmann *v.* Federal Ministry of Social Administration, **630**
Dieudonné *v.* Administration des Contributions, **11,** 399
Dilasser *et Al.*, *In re*, **317**
Director of the Hollandse Beton-Maatschappij, *In re*, **680**
Directors of the Amsterdamse Ballast Maatschappij, *In re*, **679**
Dismissal from the Civil Service, *In re*, **615**
Dooply *v.* Chan Taik, **641**
Dossett *v.* State, **449**
Dreyfus *v.* Nadoretsky, commonly called Norris, **435**

Enforcement of Foreign Judgments (Switzerland) Case, **574,** 508
Erste Znaimer Brauerei und Malzfabrik A.G., *Re*, **201,** 40
Établissements Cornet *v.* Vve Gaido, **506**
Execution of Prisoner of War Case, **533**
Expropriation of Insurance Companies Case, **197**

Farrugia *v.* Nuova Comp. Gen. Autolinee, **77,** 84
Fazal Ahmed *v.* Abdul Bari, **72**
Federated People's Republic of Yugoslavia *v.* Kafr El-Zayat Cotton Co. Ltd., **225**
Feingold and Others *v.* Administrator General, **72**
Ficorilli, *In re*, **345**
Fidelity and Surety Co. of the Philippines *v.* Sixto A. Carlos, **661**
Figueroa, *In re*, **280**
Fonseca, *In re*, **334**
Fontana *v.* S.A.I.A.T., **84**
Frölich, *In re*, **537**

G. *v.* G., **39,** 78
G. *v.* H., **633**
Galetzky, *In re*, **291**
Genocide Convention Case: *see* Reservations to the Convention on Genocide
Gerbaud *v.* Meden, **288,** 50, 244
Gibbs *et Al. v.* Rodríguez *et Al.*, **661,** 1
Ginter *v.* Minister of Justice, **314**
Girdler Corp. *v.* Charles Eneu Johnson & Co., **545,** 23
Goudsmit *v.* Boasson, **359**
Gruss *v.* Nettel, **493**
Gualco *et Al. v.* Acheson, **276**
Guerreiro *et Al.*, *In re*, **315**
Guillemot-Jacquemin Claim, **403,** 437, 439, 470, 471
Guilmain *v.* Offices des Séquestres, **529**

H. and Others *v.* Public Prosecutor, **12,** 398, 544
Hangkom Kwingtong Woo *v.* Liu Lan Fong (*alias* Liu Ah Lan), **521,** 509, 703
Harneker *v.* Gaol Superintendent, **294,** 309
Haw Pia *v.* The China Banking Corporation, **642,** 530, 593, 600, 601, 602, 662-676 *passim*
Haya de la Torre Case (Colombia *v.* Peru), **349,** 470
Hayashi *v.* Lorenz, **275**
Hermes, The, and Other Structures, **704,** 549
Hickel *v.* International Institute of Intellectual Co-operation, **460**
Hofmann, *In re*, **701,** 677
Honigman *v.* Attorney-General, **542**
Hoosain *v.* van der Merwe, N.O., and Others, **299**
Howgate *v.* Bagnall and Another, **195**
Howrani *et Al. v.* Secretary-General of the United Nations, **452**
Hydrierwerke A.G., *In re*, **38**

Improta *v.* Ranieri, **692**
Infringement of Copyright (Austria) Case, **47,** 399
Inginer N. Vlassopol, The, **725,** 530
"Interhandel" case: *see* Kaufman *v.* Société Internationale, etc.
International Refugee Organization *v.* Republic S.S. Corp. *et Al.*, **447**
Irresberger and Another *v.* Republic of Austria, **9,** 399
Issel, *In re*, **331**
Italian Special Capital Levy Duties, *Re*, **406,** 430, 433

Jani *v.* Jani and Others, **54**
Japanese Government *v.* Commercial Casualty Insurance Co., **493,** 549
Jones-Dujardin *v.* Tournant and Haussy, 398, **434**

Kahan *v.* Pakistan Federation, **210,** 50
Kajee *v.* Principal Immigration Officer, **308**
Kanbara *v.* Acheson, **276**
Kannegieser, N.O., *Ex parte*, **547**
Kaufman *v.* Société Internationale pour Participations Industrielles et Commerciales S.A. ["Interhandel"], **516,** 530
Kawakita *v.* United States, **265**

Khalidi *v.* Minister of the Interior, **264,** 20
Khan *v.* Principal Immigration Officer, **303**
Kobylinsky *v.* Banco di Chivari, **693**
Kongeriket Norges Hypotekbank *v.* Bergens Provinciallosje and Bergens Frimurerloges Understottelseskasse, **685**
Kozicki *v.* Baltycka Spolka Rybnas *et Al.*, **37**
Krüger, *In re*, **258,** 64, 243, 260, 262
Kühn *v.* Custodian of Enemy Property, **262, 512**
Kunsagi Szoevoegyar *v.* Nagimihaly, Court of Appeal and Court of Cassation of the Canton of Zürich, **20**
Kvasnak, *Re*, **292**
Kweekbedrijf *v.* Receiver of Taxes, Roermond, **515**

L. *v.* Inspector of Income Tax, **67**
Lamadrid *v.* Encarnación Verzo, **661**
La Orden de Padres Benedictinos de Filipinas *v.* Philippine Trust Co., **661**
Larraga, F. V., and Florentina Enterezo *v.* Eulogía B. Báñez, **661**
Laterrade *v.* Sangro y Torres, **359**
Latiefa *v.* Principal Immigration Officer, **294,** 286
Latvian State Cargo & Passenger S.S. Line *v.* McGrath, Attorney-General, **61,** 80
Lederer-Ponzer *v.* Rautenstrauch, **204**
Lemmel and Others *v.* Rex, **232**
LoDolce, *In re*, **318**

Magnifica Comunità di Fiemme *v.* Soc. Import. Esport. Legnami, **629**
Magri *v.* Di Marco, **689**
Malham *v.* Acre Sharia Court, **243**
Mandoli *v.* Acheson, **251**
Mange *v.* World Health Organization, **468**
Mangold's Patent, *In re*, **244,** 80
Marcos *v.* United States, **493**
Mark, Matter of, **80**
Marsh *v.* International Labour Organization, **465**
Martelly et Admin. des Domaines *v.* Díez del Corral, **347**
Massip *v.* Cruzel, **52,** 300
Mastrocola *et Al.* *v.* Acheson, **276**
Mercier *v.* International Institute of Intellectual Co-operation, **460**
Meyer *v.* Meyer, **358**
Meyer's Estate, *In re*, **499**
Military Prosecutor *v.* B. and van E., **536,** 474
Miller's Estate, *In re*, **506**
Ministère Public *v.* Oliger, **431,** 403
Ministero della Difesa-Esercito *v.* Salamone, **686**
Ministero Difesa *v.* Ambriola, **690,** 13
Mohamed *v.* Principal Immigration Officer, **299**
Molino *v.* Uff. Trasp. Roma e Soc. Nas. Trasp. Gondrand, **690**
Montoro, *In re*, **51**
Moons *v.* Becker, **279**
Muhlmann *v.* Bauer, **692**
Muller's Estate, *In re*, **506,** 570
Murata *v.* Acheson, **276**
Muzza Aceituno, *In re*, **315**

Nederlands Beheers-Instituut *v.* Nimwegen and Männer, **249,** 84, 363
Netherlands (State of the) *v.* "ANIEM", **614**
Netherlands (State of the) *v.* Federal Reserve Bank, **558,** 570, 677
Netherlands (State of the) *v.* Jeugdherbergcentrale, **613**
Netherlands (State of the) *v.* van N., **613**
Nix *et Al.*, *In re*, **260,** 64, 259
Norges Bank (Bank of Norway) *v.* Polski Komitet Azotowy, **684**
Novello & Co., Ld. *v.* Hinrichsen Edition Ld. and Another, **24,** 210, 520, 530

Office d'Aide Mutuelle Interalliée (OMA) *v.* Koerperich, **361,** 232
Office des Séquestres *v.* Muls, **531**
Okimura *v.* Acheson, **276**
Osis *v.* Minister of Justice, **300**
Ottoz Claim, **435,** 244, 471, 472

Pal *v.* Attorney-General, **542**
Palestinian Nationality Case, **55**
Pan-American Union *v.* American Security and Trust Company, **441,** 49
Pang-Tsu Mow *et Al.* *v.* Republic of China, **498**
Pass *v.* McGrath, Attorney General of the United States, **493**
Pensioenfonds voor de Grafische Vakken *v.* P.C.G., **682**
People of the Philippines *v.* Higino Sigue, **702,** 677
Personal Injuries (Upper Silesia) Case, **67,** 49
Pertusola Claim, **414,** 363, 433
Peters *et Al.* *v.* McKay, **474,** 14, 493, 570
Petroleum Development Ltd. *v.* Sheikh of Abu Dhabi, **144,** 1, 86, 164, 363, 429, 433
Petroleum Development (Qatar) Ltd. *v.* Ruler of Qatar, **161,** 144
Piedmont Silkweaving Company's Claim, **427**
Planters' Loans Board *v.* Managalam, **585**
Progressive Furniture Co. *v.* Stoneville Furniture Co., **547**
Public Prosecutor *v.* Brasseur, **396,** 13
Public Prosecutor *v.* L., **206**
Pulenciks *v.* Augustovskis, **49,** 64, 251

Qatar Arbitration : *see* Petroleum Development (Qatar) Ltd. *v.* Ruler of Qatar
Quintela *v.* Manuel Cacho and Rafaela G. Ybarlin, **661**

Ram Narain *v.* The Central Bank of India Ltd., **207**
Ramzan and Others *v.* Ramzan, **638**
Randsfjordsbruket and Jevnaker Kommune *v.* Viul Tresliperi, **635**
Rebholz *et Ux.*, *In re*, **254,** 256
Recidivist (American Military Tribunal) Case, **617,** 615, 619
Recidivist (Military Tribunal of Occupant) Case, **618**
Recidivist (Tribunal of Saar Territory) Case, **42**
Reih's Estate, *In re*, **506**
Repetti, Estate of, **393**
Republic of China *v.* Pang-tsu Mow *et Al.*, **57,** 499
Requisitioned Property (Austria) (No. 1) Case, **694**
Requisitioned Property (Austria) (No. 2) Case, **696**
Reservations to the Convention on Genocide, **364,** 433, 470
Restitution of Property (Republic of Italy) Case, **221**
Restitution of Property (Rheinland-Pfalz) Case, **45**
Rex *v.* Abul Hasan, **332,** 78
Rex *v.* Governor of H.M. Prison at Brixton and the Secretary of State for Home Affairs, *Ex parte* Pawel Sliwa, **310**
Reyling, *In re*, **256**
Rheden (Municipality of) *v.* Rohde, **613**
Riphagen, *Re*, **334**
River and Canal Administration of Pillau Case, **44**
Rivera Calmet, *In re*, **22**
Roermond (City of) *v.* The Netherlands Ministry of War, **612**
Rothbarth *v.* International Institute of Intellectual Co-operation, **463**

S. *v.* Registration Officer, **277**
S. *v.* S., **276**
S.A.I.M.I. Claim, **471**
Saelens *v.* M.P., **234,** 591
Samuelsen *v.* Norges Bank, **686**
Scarpato, *Re*, **625,** 473, 549, 591
Schaffer *et Al.* *v.* Oldak *et Al.*, **547**
Schaffner *v.* International Refugee Organization, **444,** 449
Seethalakshmi Achi *et Al.* *v.* V. T. Veerappa Chettiar, **575,** 530
Seraikella (State of) and Other States *v.* Union of India, **17,** 50, 57
Sison *v.* The Board of Accountancy and Ferguson, **14**
Sliedrecht Insurance Company and Engelaar *v.* State of the Netherlands, **84**
Sliva, *Ex parte* : *see* Rex *v.* Governor of Brixton Prison, etc.
Sobral *v.* Bergens Privatbank, **686**
Soc. Centrale de Constructions *v.* De Ayala, **348**
Soc. Costruzioni Brambilla *v.* Soc. L' Idraulica, **692**
Soc. Timber, Soc. Zeta, Soc. Ombla *v.* Ministero Esteri e Tesoro, **621,** 14
Société Bonduelle et Cie, *In re*, **573**
Société M. *v.* Administration d'Enregistrement, **280**
Société Mathieu, *In re*, **399**
Société Schweppes *v.* Administration d'Enregistrement, **401**
Socobel (Société Commerciale de Belgique) *v.* Greek State, **3,** 232, 470
Sonnino *v.* Cambise, **439**
Starke *v.* Pensions Fund of the League of Nations, **467**
State, The, (Duggan) *v.* Tapley, **336,** 318
Steinberg *v.* Attorney-General, **10**
Stenger, *Ex parte*, **325,** 14, 346
Syquia *et Al.* *v.* López *et Al.*, **228**

Tan Tuan *et Al.* *v.* Lucena Food Control Board, **590**
Ter K. *v.* State of the Netherlands, Surinam and Indonesia, **223,** 78
Th. and D., *Re*, **301**
Titho, *In re*, **537**
Tomasicchio *v.* Acheson, **275**
Trondhjems Sparebank *v.* St. Johs. Logen St. Olav til det Gjenreiste Tempel, **686**
Tse Chung *v.* Lee Yau Chu, **636**
Turk *v.* Bourdier, **289**

Uasselle *v.* Marabini, **291**
Ungarische Tuchfabrik A.G., *Re*, **206**
United States High Commissioner for Germany *v.* Gershon, **571**
United States High Commissioner for Germany *v.* Madsen, **571**
United States High Commissioner for Germany *v.* Migo and Another, **614**

V. *v.* Ogterop, **611**
Vakgroep Begrafeniswezen *v.* H.M.C.T., **609,** 262
Valdeabella *et Al.* *v.* Luz Márquez *et Al.*, **661**
Van R. *v.* Receiver of Taxes, **516**
Velasco Tovar *et Al.*, *In re*, **308**
Vereinigte Österreichische Eisen- und Stahlwerke (Voest) A.G. *v.* Federal Ministry of Finance, **697**
Verhulsdonck, *In re*, **532,** 210
Vigoureux *v.* Comité des Obligataires Danube-Save-Adriatique, **1**
Villanueva and Sanidad *v.* Director of Posts, **661**
Vlaardingen (City of) *v.* de Snayer, **613**
Von Scharberg (Baroness), *In re*, **257**

War Crimes Cases (Israel), **538,** 20
Weiss *v.* International Institute of Intellectual Co-operation, **458,** 360, 463, 465
Weyer, *In re*, **335**
Winner *v.* S.M.T. (Eastern) Ltd. and Attorney-General of New Brunswick *et Al.*, **286**
Wintgen, *In re*, **537**
Wolf, *In re*, **400,** 251
Woudstra, *In re*, **301**

X. *v.* X., **278**

Yosipof *v.* Attorney-General, **236**

Z. *v.* K., **608**

TABLE OF CASES REPORTED

[ARRANGED ACCORDING TO COURTS AND TRIBUNALS (INTERNATIONAL CASES) AND COUNTRIES (MUNICIPAL CASES AND DECISIONS OF MILITARY AND OCCUPATION COURTS)]

(The figures in heavier type indicate the page numbers of the actual reports or digests. The ordinary type indicates the pages containing the relevant cross-references.)

I. DECISIONS OF INTERNATIONAL TRIBUNALS

International Court of Justice

Anglo-Norwegian Fisheries Case, **86,** 1, 164
Haya de la Torre Case (Colombia *v.* Peru), **349,** 470
Reservations to the Convention on Genocide, **364,** 433, 470

Franco-Italian Conciliation Commission

Duc de Guise Claim, **423**
Guillemot-Jacquemin Claim, **403,** 437, 439, 470, 471
Italian Special Capital Levy Duties, *Re*, **406,** 430, 433
Ottoz Claim, **435,** 244, 471, 472
Pertusola Claim, **414,** 363, 433
Piedmont Silk-Weaving Company's Claim, **427**
S.A.I.M.I. Claim, **471**

Administrative Tribunal of the International Labour Organization

Avenol *v.* Pensions Fund of the League of Nations, **456,** 468
Desplanques *v.* Pensions Fund of the League of Nations, **460**
Hickel *v.* International Institute of Intellectual Co-operation, **460**
Mange *v.* World Health Organization, **468**
Marsh *v.* International Labour Organization, **465**
Mercier *v.* International Institute of Intellectual Co-operation, **460**
Rothbarth *v.* International Institute of Intellectual Co-operation, **463**
Starke *v.* Pensions Fund of the League of Nations, **467**
Weiss *v.* International Institute of Intellectual Co-operation, **458,** 360, 463, 465

Administrative Tribunal of the United Nations

Aubert *et Al. v.* Secretary-General of the United Nations, **450**
Howrani *et Al. v.* Secretary-General of the United Nations, **452**

International Arbitrations

(Lord Asquith of Bishopstone, Umpire)

Petroleum Development Ltd. *v.* Sheikh of Abu Dhabi, **144,** 1, 86, 164, 363, 429, 433

(Lord Radcliffe, Third Arbitrator)

Petroleum Development (Qatar) Ltd. *v.* Ruler of Qatar, **161,** 144

II. DECISIONS OF NATIONAL COURTS

Argentina

Artaza, *In re*, **333**
Fonseca, *In re*, **334**
Guerreiro *et Al.*, *In re*, **315**
Riphagen, *Re*, **334**
Weyer, *In re*, **335**

Austria

Austrian Amnesty Case, **632**
Bäcker *v.* Austrian Federal Treasury, **698,** 14
Booty (Requisitioned Car) Case, **699**

" Der Güternahverkehr " *v.* Seidl, **203,** 40
Dickmann *v.* Federal Ministry of Social Administration, **630**
Erste Znaimer Brauerei und Malzfabrik A.G., *Re*, **201,** 40
Infringement of Copyright (Austria) Case, **47,** 399
Irresberger and Another *v.* Republic of Austria, **9,** 399
Lederer-Ponzer *v.* Rautenstrauch, **204**
Requisitioned Property (Austria) (No. 1) Case, **694**
Requisitioned Property (Austria) (No. 2) Case, **696**
Ungarische Tuchfabrik A.G., *Re*, **206**
Vereinigte Österreichische Eisen- und Stahlwerke (Voest) A.G. *v.* Federal Ministry of Finance, **697**

Belgium

Bertrand, Mannès and State of Belgium *v.* Bontemps, Camus and Ramelot, **683,** 701
Ginter *v.* Minister of Justice, **314**
Guilmain *v.* Offices des Séquestres, **529**
Moons *v.* Becker, **279**
Office des Séquestres *v.* Muls, **531**
Osis *v.* Minister of Justice, **300**
Pulenciks *v.* Augustovskis, **49,** 64, 251
Socobel (Société Commerciale de Belgique) *v.* Greek State, **3,** 232, 470
State of Belgium *v.* Ramioul, **544**
Verhulsdonck, *In re*, **532,** 210

British Commonwealth
Judicial Committee of the Privy Council

Hangkom Kwingtong Woo *v.* Liu Lan Fong (*alias* Liu Ah Lan), **521,** 509, 703

Burma

Dooply *v.* Chan Taik, **641**

Canada

Kvasnak, *Re*, **292**
Winner *v.* S.M.T. (Eastern) Ltd. and Attorney-General of New Brunswick *et Al.*, **286**

Chile

Muzza Aceituno, *In re*, **315**

Denmark

Issel, *In re*, **331**

Eastern Africa

Jani *v.* Jani and Others, **54**

Egypt

Chammas *v.* Ministry of the Interior, **429,** 398, 399
Federated People's Republic of Yugoslavia *v.* Kafr El-Zayat Cotton Co. Ltd., **225**
Th. and D., *Re*, **301**

Eire

The State (Duggan) *v.* Tapley, **336,** 318

England
(*see also British Commonwealth*)

Bank voor Handel en Scheepvaart N.V. *v.* Slatford and Another, **171,** 246, 250, 440, 520, 530, 565
Banque des Marchands de Moscou (Koupetschesky) *v.* Kindersley and Another, **189**
Bugsier Reederei- und Bergungs-Aktiengesellschaft *v.* Owners of s.s. *Brighton*, **509**
Hermes, The, and Other Structures, **704,** 549
Howgate *v.* Bagnall and Another, **195**
Inginer N. Vlassopol, The, **725,** 530
Kahan *v.* Pakistan Federation, **210,** 50
Mangold's Patent, *In re*, **244,** 80
Novello & Co., Ld. *v.* Hinrichsen Edition Ld. and Another, **24,** 210, 520, 530
Rex *v.* Governor of H.M. Prison at Brixton and the Secretary of State for Home Affairs, *Ex parte* Pawel Sliwa, **310**

France

A., *In re*, **324**
Anciens Établissements Graf Frères *v.* Société La Mure, **678,** 701
Baque *v.* Agusty, **435**
Barrabini, *In re*, **507,** 265
Benzoni *v.* Davidovici, **392**
Bertuzzi *v.* Éts. Santarelli Frères, **290**
Bour *v.* Bour, **609**
Cabet de Chambine *v.* Bessis, **51**
Compagnie des Wagons-Réservoirs *v.* Ministry of Industry and Commerce and Italian Railways, **394**
Daem, *In re*, **395,** 14, 334
D' Amico, *In re*, **246**
Dreyfus *v.* Nadoretsky, commonly called Norris, **435**
Établissements Cornet *v.* Vve Gaido, **506**
Galetzky, *In re*, **291**
Gerbaud *v.* Meden, **288,** 50, 244
Jones-Dujardin *v.* Tournant and Haussy, **434,** 398
Laterrade *v.* Sangro y Torres, **359**
Martelly et Admin. des Domaines *v.* Díez del Corral, **347**
Massip *v.* Cruzel, **52,** 300
Ministère Public *v.* Oliger, **431,** 403
Montoro, *In re*, **51**
Repetti, Estate of, **393**

Soc. Centrale de Constructions *v.* De Ayala, **348**
Société Bonduelle et Cie, *In re*, **573**
Société M. *v.* Administration d'Enregistrement, **280**
Société Mathieu, *In re*, **399**
Société Schweppes *v.* Administration d'Enregistrement, **401**
Turk *v.* Bourdier, **289**
Uasselle *v.* Marabini, **291**
Vigoureux *v.* Comité des Obligataires Danube-Save-Adriatique, **1**
Wolf, *In re*, **400,** 251
Woudstra, *In re*, **301**
Z. *v.* K., **608**

Germany

Austrian Nationality Case, **248**
Austro-German Extradition Case, **330**
Booty (Determination of Ownership) Case, **620**
Collision in the Baltic Case, **40,** 69
Compulsory Grant of German Nationality Case, **247**
Confiscation of Machine (Germany) Case, **199**
Dismissal from the Civil Service, *In re*, **615**
Enforcement of Foreign Judgments (Switzerland) Case, **574,** 508
Execution of Prisoner of War Case, **533**
Expropriation of Insurance Companies Case, **197**
Hydrierwerke A.G., *In re*, **38**
Palestinian Nationality Case, **55**
Personal Injuries (Upper Silesia) Case, **67,** 49
Recidivist (American Military Tribunal) Case, **617,** 615, 619
Recidivist (Military Tribunal of Occupant) Case, **618**
Recidivist (Tribunal of Saar Territory) Case, **42**
Restitution of Property (Republic of Italy) Case, **221**
Restitution of Property (Rheinland-Pfalz) Case, **45**
River and Canal Administration of Pillau Case, **44**

Greece

Criminal Files (Greece) Case, **629**

Holland

American Business Machines Corporation *v.* Onderlinge Oorlogsschade-verzekering Maatschappij, **473,** 701
Asia Trading Co., Limited *v.* Biltimex, **433**
Beck, *In re*, **537**
Christen *v.* Onderlinge Oorlogs-Molest-verzekerings-Maatschappij, **681**
Director of the Hollandse Beton-Maatschappij, *In re*, **680**
Directors of the Amsterdamse Ballast Maatschappij, *In re*, **679**
Frölich, *In re*, **537**
G. *v*. G., **39,** 78
Hofmann, *In re*, **701,** 677
Krüger, *In re*, **258,** 64, 243, 260, 262
Kweekbedrijf *v.* Receiver of Taxes, Roermond, **515**
Nederlands Beheers-Instituut *v.* Nimwegen and Männer, **249,** 82, 363
Netherlands (State of the) *v.* " ANIEM ", **614**
Netherlands (State of the) *v.* Jeugdherbergcentrale, **613**
Netherlands (State of the) *v.* van N., **613**
Nix *et Al.*, *In re*, **260,** 64, 259
Pensioenfonds voor de Grafische Vakken *v.* P.C.G., **682**
Public Prosecutor *v.* L., **206**
Rebholz *et Ux.*, *In re*, **254,** 256
Reyling, *In re*, **256**
Rheden (Municipality of) *v.* Rohde, **613**
Roermond (City of) *v.* The Netherlands Ministry of War, **612**
S. *v.* Registration Officer, **277**
Sliedrecht Insurance Company and Engelaar *v.* State of the Netherlands, **84**
Ter K. *v.* State of the Netherlands, Surinam and Indonesia, **223,** 78
Titho, *In re*, **537**
V. *v.* Ogterop, **611**
Vakgroep Begrafeniswezen *v.* H.M.C.T., **609,** 262
Van R. *v.* Receiver of Taxes, **516**
Vlaardingen (City of) *v.* de Snayer, **613**
von Scharberg (Baroness), *In re*, **257**
Wintgen, *In re*, **537**
X. *v.* X., **278**

Hong Kong

Tse Chung *v.* Lee Yau Chu, **636**

India

Bhagwan Shankar *v.* Rajarum Bapu, **69,** 72
Ram Narain *v.* The Central Bank of India Ltd., **207**
Rex *v.* Abul Hasan, **332,** 78
Seethalakshmi Achi *et Al. v.* V. T. Veerappa Chettiar, **575,** 530
Seraikella (State of) and Other States *v.* Union of India, **17,** 50, 57

Israel

Ahmed *v.* Military Governor, Galilee, **264**
Ali Hamud *et Al. v.* Minister of the Interior, **264**
Association for the Protection of Palestine Government Bondholders *v.* Minister of Finance of Israel, **398**
Attorney-General *v.* Enigster, **540**
Attorney-General *v.* Levitan, **64**

Attorney-General *v.* Tarnek, **539**
Attorney-General of Israel *v.* El-Turani, **164,** 23, 79, 469
Badawi *v.* Military Governor, Galilee, **264**
Feingold and Others *v.* Administrator General, **72**
Goudsmit *v.* Boasson, **359**
Honigman *v.* Attorney-General, **542**
Khalidi *v.* Minister of the Interior, **264,** 20
L. *v.* Inspector of Income Tax, **67**
Malham *v.* Acre Sharia Court, **243**
Pal *v.* Attorney-General, **542**
Steinberg *v.* Attorney-General, **10**
War Crimes Cases (Israel), **538,** 20
Yosipof *v.* Attorney-General, **236**

Italy

Az. Comm. Ital. Carboni *v.* Meiorini, **84**
C.E.A.T. *v.* Società Hungaria, **81**
Farrugia *v.* Nuova Comp. Gen. Autolinee, **77,** 82
Fontana *v.* S.A.I.A.T., **84**
Improta *v.* Ranieri, **692**
Kobylinsky *v.* Banco di Chivari, **693**
Magnifica Comunità di Fiemme *v.* Soc. Import. Esport. Legnami, **629**
Magri *v.* Di Marco, **689**
Ministero della Difesa-Esercito *v.* Salamone, **686**
Ministero Difesa *v.* Ambriola, **690,** 13
Molino *v.* Uff. Trasp. Roma e Soc. Nas. Trasp. Gondrand, **690**
Muhlmann *v.* Bauer, **692**
Scarpato, *Re*, **625,** 473, 549, 591
Soc. Costruzioni Brambilla *v.* Soc. L' Idraulica, **692**
Soc. Timber, Soc. Zeta, Soc. Ombla *v.* Ministeri Esteri e Tesoro, **621,** 14
Sonnino *v.* Cambise, **439**
Stenger, *Ex parte*, **325,** 14, 346

Kenya

Abdou *v.* Attorney-General of Kenya, **282,** 309

Luxemburg

Dieudonné *v.* Administration des Contributions, **11,** 399
G. *v.* H., **633**
H. and Others *v.* Public Prosecutor, **12,** 398, 544
Office d'Aide Mutuelle Interalliée (OMA) *v.* Koerperich, **361,** 232
Public Prosecutor *v.* Brasseur, **396,** 13

Malaya

Planters' Loans Board *v.* Managalam, **585**

Mexico

Figueroa, *In re*, **280**
Velasco Tovar *et Al.*, *In re*, **308**

Norway

Andresens Bank and Bergens Privatbank *v.* Norges Bank, **685**
Custodian of Enemy Property *v.* Grunert, **263**
Kongeriket Norges Hypotekbank *v.* Bergens Provinciallosje and Bergens Frimurerloges Understottelseskasse, **685**
Kühn *v.* Custodian of Enemy Property, **262, 512**
Norges Bank (Bank of Norway) *v.* Polski Komitet Azotowy, **684**
Randsfjordsbruket and Jevnaker Kommune *v.* Viul Tresliperi, **635**
Samuelsen *v.* Norges Bank, **686**
Sobral *v.* Bergens Privatbank, **686**
Trondhjems Sparebank *v.* St. Johs. Logen St. Olav til det Gjenreiste Tempel, **686**

Pakistan

Fazal Ahmed *v.* Abdul Bari, **72**

Peru

Rivera Calmet, *In re*, **22**

Philippines

Andres and Herminia Pichay *v.* Rosario Mata *et Al.*, **661**
Araneta *v.* Alva J. Hill, **661**
De Asis *v.* José B. Feliciano, **661**
De Belarmino (Plácida Clemente and Mauro) *v.* Pedro de Mesa, **661**
Del Rosario *et Al.* *v.* Carlos Sándico *et Al.*, **661**
Fidelity and Surety Co. of the Philippines *v.* Sixto A. Carlos, **661**
Gibbs *et Al.* *v.* Rodríguez *et Al.*, **661,** 1
Haw Pia *v.* The China Banking Corporation, **642,** 530, 593, 600, 601, 602, 662-676 *passim*
Lamadrid *v.* Encarnación Verzo, **661**
La Orden de Padres Benedictinos de Filipinas *v.* Philippine Trust Co., **661**
Larraga, F. V., and Florentina Enterezo *v.* Eulogía B. Báñez, **661**
People of the Philippines *v.* Higino Sigue, **702,** 677
Quintela *v.* Manuel Cacho and Rafaela G. Ybarlin, **661**
Sison *v.* The Board of Accountancy and Ferguson, **14**
Syquia *et Al.* *v.* López *et Al.*, **228**
Tan Tuan *et Al.* *v.* Lucena Food Control Board, **590**
Valdeabella *et Al.* *v.* Luz Márquez *et Al.*, **661**
Villanueva and Sanidad *v.* Director of Posts, **661**

Saar

Ministère Public *v.* Oliger, **431,** 403

Singapore

Ramzan and Others *v.* Ramzan, **638**

South-West Africa

Kannegieser, N.O., *Ex parte*, **547**

Sweden

Kozicki *v.* Baltycka Spolka Rybnas *et Al.*, **37**

Switzerland

Aarau and Altenrhein (Communes of) *v.* Noger, **293**
Ficorilli, *In re*, **345**
Kunsagi Szoevoegyar *v.* Nagimihaly, Court of Appeal and Court of Cassation of the Canton of Zürich, **20**
S. *v.* S., **276**

Union of South Africa

Harneker *v.* Gaol Superintendent, **294,** 309
Hoosain *v.* van der Merwe, N.O., and Others, **299**
Kajee *v.* Principal Immigration Officer, **308**
Khan *v.* Principal Immigration Officer, **303**
Latiefa *v.* Principal Immigration Officer, **294,** 286
Meyer *v.* Meyer, **358**
Mohamed *v.* Principal Immigration Officer, **299**

United States of America

Aboitiz & Co. *v.* Price, **592,** 532, 544, 567
Anderson *v.* Speyer, **219**
Braunstein's Estate, *In re*, **79**
Capitol Records *v.* Mercury Record Corp., **570**
Caravas' Estate, *In re*, **493,** 492
Central States Power & Light Corp. *et Al.*, *In re*, **570**
China (Republic of) *v.* Pang-tsu Mow *et Al.*, **57,** 499
Cities Service Company *v.* McGrath, **513,** 206
Cobb *v.* United States, **549,** 677
D' Aquino *v.* United States, **276**
Dossett *v.* State, **449**
Girdler Corp. *v.* Charles Eneu Johnson & Co., **545,** 23
Gruss *v.* Nettel, **493**
Gualco *et Al. v.* Acheson, **276**
Hayashi *v.* Lorenz, **275**
International Refugee Organization *v.* Republic S.S. Corp. *et Al.*, **447**
Japanese Government *v.* Commercial Casualty Insurance Co., **493,** 549
Kanbara *v.* Acheson, **276**
Kaufman *v.* Société Internationale pour Participations Industrielles et Commerciales S.A. [" Interhandel "], **516,** 530
Kawakita *v.* United States, **265**
Latvian State Cargo & Passenger S.S. Line *v.* McGrath, Attorney-General, **61,** 80
LoDolce, *In re*, **318**
Mandoli *v.* Acheson, **251**
Marcos *v.* United States, **493**
Mark, Matter of, **80**
Mastrocola *et Al. v.* Acheson, **276**
Meyer's Estate, *In re*, **499**
Miller's Estate, *In re*, **506**
Muller's Estate, *In re*, **506,** 570
Murata *v.* Acheson, **276**
Netherlands (State of the) *v.* Federal Reserve Bank, **558,** 570, 677
Okimura *v.* Acheson, **276**
Pan-American Union *v.* American Security and Trust Company, **441,** 49
Pang-Tsu Mow *et Al. v.* Republic of China, **498**
Pass *v.* McGrath, Attorney General of the United States, **493**
Peters *et Al. v.* McKay, **474,** 14, 493, 570
Progressive Furniture Co. *v.* Stoneville Furniture Co., **547**
Reih's Estate, *In re*, **506**
Schaffer *et Al. v.* Oldak *et Al.*, **547**
Tomasicchio *v.* Acheson, **275**

Venezuela

Dilasser *et Al.*, *In re*, **317**

West Indies

Lemmel and Others *v.* Rex, **232**

III. DECISIONS OF MILITARY AND OCCUPATION COURTS

American Zone of Germany

Schaffner *v.* International Refugee Organization, **444,** 449
United States High Commissioner for Germany *v.* Gershon, **571**
United States High Commissioner for Germany *v.* Madsen, **571**
United States High Commissioner for Germany *v.* Migo and Another, **614**

Belgium, Military Tribunal at Brussels

Saelens *v.* M.P., **234,** 591

Holland, Court Martial

Military Prosecutor *v.* B. and van E., **536,** 474

TABLE OF CASES CITED

Acheson *v*. Murakami, 269
Acheson, Secretary of State *v*. Wohlmuth, 276
Adler's Estate, Matter of, 80
Agency of Canadian Car & Foundry Company, Ltd., *et Al*. *v*. American Can Company, 58
Agrocide *v*. Arsocid, 568
Alexander's (Cotton) Case, 496
Alleganean, The, 120
Allgemeine Ortskrankenkasse Bremen *v*. International Refugee Organization, 444
Alwaki, The, 724
American Insurance Co. *v*. Canter, 553, 555
Amy *v*. City of Watertown, 480
Anderson *v*. N.V. Transandine Handelmaatschappij, 182, 246, 249, 562, 565, 566
Anglo-International Bank Ltd., *In re*, 581, 585
Anglo-Mexican, The, 729
" ANIEM " *v*. State of the Netherlands, 614
Anne, The, 116
Antwerp (City of) *v*. Germany, 606, 607
Arnold *v*. Ellison, 480, 487
Aspdin *v*. Austin, 656
Attorney-General *v*. Altshuler, 238
Attorney-General of Israel *v*. Sylvester, 10
Attorney-General of the United States *v*. Ricketts, 269

Balfour, Guthrie & Co. *v*. United States, 448
Bank of Augusta *v*. Earle, 16
Bank of China *v*. Wells Fargo Bank & U.T. Co., 562
Banque de France *v*. Equitable Trust Co., 61
Bartlett *v*. Venor, 594
Beleno, The, 719
Bellaman, The, and The Agostino Bertani, 705, 714, 716, 717, 719
Bennett *v*. Worthington, 479
Bernon, The, 728
Bernstein *v*. Van Heyghen Frères Société Anonyme, 563, 564
Bertha Elizabeth, The, 719
Billings *v*. Reed, 196
Blythe *v*. Hinckley, 501
Bochart *v*. Committee of Supplies of Corneux, 606
Bolletta, The, 580
Borovitz *v*. American Hard Rubber Co., 481, 483, 487
Boston Penny Savings Bank *v*. Stoneholm Co., 545
Brewer *v*. United States, 550
Brown *v*. Hiatts, 478
Brunell *v*. United States, 550
Burgman *v*. United States, 274

Cannon Brewery Co. Ltd. *v*. Central Control Board, 587
Chandler *v*. United States, 274
Château-Thierry (Duke of), *Ex parte*, 283, 285, 310, 312, 313
Christóbal Rono *v*. José L. Gómez, 602
Chunilal Kasturchand *v*. Dundappa, 70
Cilleken *v*. De Haas, 606
Clark *v*. Allen, 501, 502,
Clark *v*. Uebersee Finanz Korp., 514
Clipperton Island Arbitration, 156
Coffin *v*. Landis, 656
Coleman *v*. State of Tennessee, 321, 323, 561
Colonna, *Ex parte*, 480, 496
Colorado Fuel & Iron Co. *v*. Industrial Commission, 483, 487
Colorni *v*. Ministry of War, 688, 691
Colquhoun *v*. Brooks, 150
Compañía Española de Navegacíon Marítima, S.A. *v*. The *Navemar*, 62
Compañía Naviera Vascongado *v*. S.S. *Cristina*, 213, 214
Confederate Note Case, 601
Cooper's Estate, *Re*, 548
Cosmopolite, The, 582
Cramer *v*. United States, 270, 271
Crawford *v*. The *William Penn*, 497
Cremedi *v*. Powell (*The Gerasimo*), 579, 580
Cricklewood Property and Investment Trust Ltd. *v*. Leighton's Investment Trust Ltd., 528
Cross *v*. Harrison, 552, 554

Daimler Co. Ld. *v*. Continental Tyre & Rubber Co. (Great Britain) Ld., 185
Darnall *v*. Day, 546
Dart, The, 580
De Brabant and Gosselin *v*. T. and A. Florant, 606, 607
De Lima *v*. Bidwell, 550, 551
Delmas *v*. Merchants' Insurance Co., 601
De Mysliwiec, *In re*, 315
De Nimal *v*. De Nimal, 560, 568
Deutsche Bank Filiale Nürnberg *v*. Humphrey, 672
Deutschland, The, 130
Donaldson *v*. Thomson, 580
Dooley *v*. United States, 554
Dow *v*. Johnson, 322, 323
Drewry (H. P.), S.A.R.L. *v*. Onassis, 480, 486
Driefontein Consolidated Gold Mines *v*. Janson, 577

Duff Development Co. Ld. *v.* Government of Kelantan, 216, 217, 218, 219
Dunn *v.* Sayles, 656

E.B.M. Co. Ld. *v.* Dominion Bank, 184
Eastern Greenland Arbitration, 156
Edward and Mary, The, 708, 709
Egerton *v.* Brownlow, 181
El Condado, The, 177, 179, 180
Eleko *v.* Officer Administering the Government of Nigeria, 285
Elliott, *Ex parte*, 233
Emules, The, 582
Erickson *v.* United States, 449
Ertel Bieber & Co. *v.* Rio Tinto Company, 582
Esperanza, The, 709
Esposito *v.* Bowden, 525, 582, 583
Etsuko Arikawa *v.* Acheson, 269
Evans *v.* Finley, 480
Everret Steamship Corporation *v.* Bank of the Philippine Islands, 668, 669
Exchange, The Schooner, *v.* McFaddon, 321

Fama, The, 580, 581
Ferronato e Brocchi *v.* Brocchi, 81
First National Bank of Pittsburgh *v.* Anglo-Oesterreichische Bank, 481
Fleming *v.* Page, 551, 552, 567
Flensburger Dampfercompagnie *v.* United States, 500
Frabutt *v.* New York, Chicago & St. Louis R. Co., 480, 487
Frankfurther *v.* Exner (W.L.) Ld., 26, 27
Frederick VIII, The, 720
Furtado *v.* Rogers, 582

Gallewski *v.* H. Hentz & Co., 488
Gerasimo, The, 579, 580
Gillars *v.* United States, 267
Gogal, *In re*, 269
Goldsmith *v.* Manufacturers' Liability Insurance Co., 594
Goos *v.* Brocks, 501, 502
Grâce-Berleur (Commune of) *v.* Colliery of Gosson Lagasse, 606
Guaranty Trust Co. *v.* United States, 61, 495
Gully *v.* First National Bank, 449
Gurdyal Singh *v.* Raja of Faridkote, 71, 72
Gutenfels, The, 581

Haley *v.* Sprague, 483
Hamilton *v.* McClaughry, 322
Hanauer *v.* Woodruff, 601
Hanger *v.* Abbott, 477, 478, 479, 488, 489
Happy Couple, The, 580
Harmony, The, 711
Hatsuye Ouye *v.* Acheson, 269
Hefferman *v.* Porter, 591
Heina, The, 116
Hemple *v.* Weedin, 504
Hichino Uyeno *v.* Acheson, 557
Hilton *v.* Guyot, 16
Hollenback *v.* United States, 546
Hongkong and Shanghai Banking Corporation *v.* Luís Pérez Samanillo, Inc., *et Al.*, 602, 662, 668, 669, 675
Hoogeveen *et Al.*, *Re*, 568
Hoop, The, 524, 580, 582
Hunter *v.* Northern Insurance Marine, 713

I.G. Farbenindustrie A/G. and Bayer Products Ld. Agreement, *In re*, 33
Industrial Commission of Ohio *v.* Rotar, 480, 483, 487
Inland Steel Co. *v.* Jelenovic, 480, 487, 491
Ixion, The, 717

James (Fred. S.) & Co. *v.* Second Russian Insurance Co., 62
Janson *v.* Driefontein Consolidated Mines Ltd., 547, 578
Johnson *v.* Eisenträger, 496, 599
Jupiter, The (No. 3), 179, 180

Kahn's Estates, *In re*, 562
Kaiser Wilhelm II, The, 481, 483
Kara Deniz, The, 729
Karnuth *v.* United States, 501
Kawato, *Ex parte*, 496, 498
Keegan *v.* Dawson, 196
Kerschaw *v.* Kelsey, 582
Key & Hubbard *v.* Vincent Pearse, 722
Kharbutli *v.* Minister of Defence and Others, 167
Kiyoshi Hirabayashi *v.* United States, 269
Knox *v.* Exchange Bank of Virginia, 656
Knox *v.* Lee and Parker, 656
Knutzen, *In re* Estate of, 501
Ko Maung Tin *v.* U Gon Man, 641
Kotzias *v.* Tyser, 548
Krzus *v.* Crow's Nest Pass Coal Co. Ld., 196
Kuk *v.* Minister of Defence, 73

Laane and Baltser *v.* Estonian State Cargo and Passenger Steamship Line, 62
Lahis *v.* Minister of Defence and Others, 165
Lamont *v.* Travelers Ins. Co., 220, 221
Land *v.* Dollar, 230, 231
Leavitt *v.* Dabney, 221
Le Caux *v.* Eden, 720, 722
Lecouturier *v.* Rey, 178, 179
Leonora, The, 581
Levinson *v.* Boas, 594
Levy *v.* Stewart, 480
Lindo *v.* Rodney, 710, 720
Lloyd Generale Italiano, *In re*, 193
Lorentzen *v.* Lydden & Co. Ld., 177, 178, 180, 183, 249, 565
Lucke, *In re*, 319

Macaura *v.* Northern Assurance Co. Ld., 184

McGrath *v.* Cities Service Co., 566
Mackenzie *v.* Hare, 267, 268
MacLeod *v.* United States, 477, 487
McManus *v.* Fulton, 594
Malines (City of) *v.* Société Centrale pour l'Exploitation du Gaz, 606
Manilla, The, 580
Maret, The, 61, 62
Markham *v.* Cabell, 514
Mathot *v.* Longue, 606
May, The Ship v. The King, 116
Meiji Fujizawa *v.* Acheson, 270
Mellows *v.* Low, 720
Metropolitan National Bank of New York City *v.* Gordan, 479
Meunier, *In re*, 338
Mighell *v.* Sultan of Johore, 215, 216, 218, 219
Miller's Estate, *In re*, 506
Milligan, *Ex parte*, 591
Mitchel *v.* United States, 553
Monkland *v.* Jack Barclay Ld., 181
Monte Contes, The, 724

Nathan *v.* Equitable Trust Co., 488
Navemar, The, 62
Neely *v.* Henkel (No. 1), 551
New Orleans (City of) *v.* Steamship Co., 551, 553
Noordam, The (No. 2), 185
North German Lloyd S.S. Co. *v.* Hedden, 500

Occupation of Cavalla Case, 560, 568
Ochoa *v.* Hernández y Morales, 552, 554, 598
Oetjen *v.* Central Leather Company, 58, 61, 563
Ortega *v.* Lara, 553
Osborne *v.* United States Bank, 448
Osbourne *v.* United States, 484, 487
Over the Top, The, 476

Panama Railroad Co. *v.* Bosse, 553
Panariellos, The, 582
Paquete Habana, The, 475
Parlement Belge, The, 218
Passolunghi and Salamone, *Re*, 81
Pellworm, The, 708, 710
Perkins *v.* Elg, 252, 267, 268, 269, 272, 274
Petrogradsky Mejdunarodny Kommerchesky Bank *v.* Nat. City Bk., 62
Philippine Sugar Estates Development Co. *v.* United States, 553
Philippine Trust Company *v.* Luis Ma. Araneta *et Al.*, 602
Pillage of Schloss Gumpenstein Case, 9
Planter's Bank *v.* Union Bank, 601
Porter *v.* Freudenberg, 287, 480, 484, 583
Portland, The, 578
Progress, The, 714, 715
Protector, The, 480
Public Prosecutor *v.* Reidar Haaland, 568

Queen City, The Ship, v. The King, 116

R. *v.* Commissioner of Police and Another, *Ex parte* Nalder, 344
R. *v.* Fulham and Kensington Rent Tribunal, *Ex parte* Marks, 176
R. *v.* Governor of Brixton Prison, 283
R. *v.* Hughes, 233
R. *v.* Paddington and St. Marylebone Rent Tribunal, *Ex parte* Bedrock Investments Ld., 176
R. *v.* Secretary of State for Home Affairs, *Ex parte* Bressler, 311
R. *v.* Secretary of State for Home Affairs, *Ex parte* Duke of Château-Thierry, 283, 285, 310, 312, 313
R. *v.* Secretary of State for Home Affairs, *Ex parte* L., 246
R. *v.* Superintendent of Chiswick Police Station, *Ex parte* Sacksteder, 283, 284, 285
Rabenek Case, 192, 194
Rapid, The, 525, 581
Rebeckah, The, 707, 709
Reparation for Injuries Suffered in the Service of the United Nations, 106
Ricaud *v.* American Metal Company Ltd., 58, 563
Riddell *v.* Fuhrman, 475
Robson *v.* Premier Oil and Pipe Line Co., 582
Rodríguez *v.* Speyer Brothers, 583
Rogers *v.* Smith Bell, 656
Rohde *v.* Rheden, 614
Romaris, *In re* Estate of, 501
Rosell *v.* State Industrial Accident Comm., 480
Ross *v.* Jones, 480
Rothbarth *v.* Herzfeld, 480
Roumania (Kingdom of) *v.* Guaranty Trust Co. of New York, 221
Roumanian, The, 713, 717, 718, 722
Russian and English Bank *v.* Baring Bros. & Co., 194
Russian and English Bank, *In re*, 193
Russian Bank for Foreign Trade, *In re*, 179
Russian Government *v.* Lehigh Valley R. Co., 495
Russian Republic *v.* Cibrario, 495, 496

Sadowski *v.* Hubbard Steel Foundry Co., 490
St. Just, The, 130, 131, 143
Salimoff & Co. *v.* Standard Oil Co., 62
Saloman *v.* Saloman & Co., 184
Samuels *v.* United Seamen's Service, 545
Sanderson *v.* Morgan, 496
Savorgnam *v.* United States, 269
Schwartz *v.* India Rubber, Gutta Percha and Telegraph Works Co. Ld., 196
Schwegmann Bros. *v.* Calvert Distillers Corp., 557
Scotia, The, 475

Scott, *Ex parte*, 234
Sedgwick Collins & Co. *v.* Rossia Insurance Co. of Petrograd, 179
Semmes *v.* Hartford Insurance Company, 479
Shanti *v.* Attorney-General, 239
Shapleigh *v.* Mier, 554
Shimshon *v.* Attorney-General, 76
Ships taken at Genoa Case, 710
Silesian-American Corp. *v.* Clark, 514
Siplyak *v.* Davis, 481, 482, 491
Skiriotes *v.* Florida, 475
Société Anonyme Belge des Mines d'Aljustrel (Portugal) *v.* Anglo-Belgian Agency, Limited, 581
Society for Propagation of the Gospel *v.* New Haven, 501, 502
Sokoloff *v.* National City Bank, 62
Sommelsdijk, The, 718
Soorthingjee Sakalchand *v.* Mahomed Nasurudeen, 584
Sophie Rickmers, The, 501, 502
Sorkis *v.* Amed, 77, 81
Sovfracht (V/O) *v.* Van Udens Scheepvaart en Agentuur Maatschappij (N/V. Gebr.), 484, 577, 578, 579, 580, 581, 583
Spain (Government of the Republic of) *v.* National Bank of Scotland Ld. (*The El Condado*), 177, 179, 180
Standard Oil Co. *v.* New Jersey, 185, 515
Stasiuk and Jagnycz *v.* Klewec, 568
State *ex rel.* Bowles *v.* Olson, 480
State [*ex. rel.* Miner] *v.* Reardon, 501, 502, 504
State (Geortz) *v.* Minister for Justice, 343
State (Kennedy) *v.* Little, 344
Stevenson (Hugh) & Sons *v.* Aktiengesellschaft für Cartonnagen-Industrie, 583
Stinson *v.* New York Life Ins. Co., 546
Straneri *v.* United States, 550
Stumpf *v.* Schreiber Brewing Co., 497
Sullivan *v.* São Paulo, 58
Sutton *v.* Sutton, 501

Tallinna Laevauhisus *v.* Tallinna Shipping Co. Ltd., 175
Tamlin *v.* Hannaford, 586, 587
Techt *v.* Hughes, 501, 502
Terlinden *v.* Ames, 500
Thalia, The, 719
Théophile *v.* Solicitor-General, 11
Thirty Hogsheads of Sugar *v.* Boyle, 560, 580
Thorington *v.* Smith, 552, 593, 595, 601, 657, 658
Three Motor Gunboats, The, 713
Tindal *v.* Wesley, 230
Tingley *v.* Müller, 522, 527, 583
Tomalin *v.* S. Pearson & Son Ld., 195, 196
Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, 258
Turner, *In re* Estate of, 501
Twee Gebroeders, The, 131

Uebersee Finanz-Korporation, A.G. *v.* McGrath, 518
Unitas, The, 728
United States *v.* Belmont, 62, 182
United States *v.* Chemical Foundation, Inc., 652
United States *v.* Curtiss-Wright Export Corp., 62, 272, 551, 552
United States *v.* Huckabee, 555
United States *v.* Lee, 230
United States *v.* Percheman, 555
United States *v.* Pink, 62
United States *v.* Rice, 321, 551, 552, 553, 560, 561, 567, 580
United States *v.* S. S. White Dental Manufacturing Company, 652, 665, 672
United States *v.* Spelar, 550, 552, 553, 556, 557
United States *v.* Standard Rice Co., 546
United States *v.* State of California, 115
United States *v.* State of Texas, 115
United States *v.* Tindal, 230
United States *v.* [Utah, Nevada and California] Stage Co., 546
United States *ex rel.* Oppenheim *v.* Hecht, 320
United States High Commissioner for Germany *v.* Barshey, 571
United States High Commissioner for Germany *v.* Janson, 573
United States Military Government *v.* Goldner, 571
United States Military Government *v.* Ybarbo, 445
Usparicha *v.* Noble, 510

Vilas *v.* Manila, 553
Von Hofmannsthal *v.* Wolfe, 486, 489
Von Leeb and Others, *In re* (German High Command Trial), 535

Wagons-Citernes Claim, 395
Wall *v.* Robson, 480
Wasa Steamship Co. Ltd. O/Y *v.* Newspaper Pulp and Wood Export Ltd., 177
Watts, Watts & Co. *v.* Unione Austriaca di Navigazione, 490
William Penn, The, 497
Wuthrik *v.* David, 584

Yamashita, *In re* (1945), 599
Yoshiro Shibata *v.* Acheson, 269

Zeliznik *v.* Lytle Coal Co., 481
Zimmerman *v.* Sutherland, 672

LIST OF ABBREVIATIONS

OF TITLES OF COLLECTIONS OF DECISIONS, LAW REPORTS, PERIODICALS, ETC., QUOTED IN THE TEXT

A. (or Atl.) = Atlantic Reporter (United States).
A.C. = British House of Lords and Judicial Committee of the Privy Council.
A.D. = Supreme Court of the Union of South Africa, Appellate Division.
A.I.R. = The All India Reporter.
All E.R. = The All England Law Reports.
A.L.R. 2d = American Law Reports, Second Series.
Annual Digest = Annual Digest and Reports of Public International Law Cases.
App. D.C. = United States Court of Appeals, District of Columbia.
App. Div. = Supreme Court Reports (New York), Appellate Division.
A.T.F. = Arrêts du Tribunal Fédéral Suisse.
B.G. = Bundesgericht (Germany).
B.G.E. = Entscheidungen des Bundesgerichts (Switzerland).
BGHSt. = Entscheidungen des Bundesgerichtshofes in Strafsachen (Germany).
BGHZ = Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany).
C.A.R. (U.S.) = Court of Appeals Reports of the United States Courts of the Allied High Commission for Germany.
C. (or Ch.) Rob. = C. Robinson's Admiralty Reports (1799–1808).
Ch. App. Cases = Law Reports : Appeal Cases, Chancery Division.
Ch. (or Ch.D.) = Chancery Division of the English High Court of Justice.
C.L.R. = Ceylon Law Reports.
Clunet = Clunet, Journal du Droit international.
C.P.D. = Supreme Court of the Union of South Africa, Cape Provincial Division.
Dalloz = Recueil périodique et critique de Jurisprudence, de Législation et de Doctrine (founded by Dalloz).
D.L.R. = Dominion Law Reports (Canada).
E.A.C.A. = Eastern Africa Court of Appeals.
Eq. = Law Reports : Equity.
F. (or Fed.) = Federal Reporter (United States).
F. 2d = Federal Reporter (Second Series).
F.C.R. = Federal Court Reports (India).
F.R.D. = Federal Rules Decisions (United States).
F. Supp. = Federal Supplement (United States).

H.K.L.R. = Hong Kong Law Reports.
H. of L. App. Cas. = House of Lords, Appeal Cases.
I.A. = Indian Appeals decided in the Judicial Committee of the Privy Council.
I.C.J. Reports = International Court of Justice. Reports of Judgments, Advisory Opinions and Orders.
I.L.R. = India Law Reports.
I.R. = Irish Law Reports.
J.Bl. = Juristische Blätter (Austria).
JZ = Juristenzeitung (Germany).
K.B. (or K.B.D.) = King's Bench Division of the English High Court of Justice.
K.L.R. = Kenya Law Reports.
L.Ed. = Supreme Court Reporter, Lawyers' Edition (United States).
Ll.L.Rep. = Lloyd's List Law Reports (England).
Ll.P.C. = Lloyd's Prize Cases.
L.N.T.S. = League of Nations Treaty Series.
L.R. = Law Reports (England).
L.R.B.G. = British Guiana Law Reports.
L.T.[R.] = Law Times [Reports] (England).
M.L.R. = Malayan Law Reports.
N.J. = Nederlandse Jurisprudentie (Holland).
NJW = Neue Juristische Wochenschrift (Germany).
N.Y.S[upp]. = New York Supplement.
N.Z.L.R. = New Zealand Law Reports.
Ob. = Oberster Gerichtshof (Austria).
ÖJZ = Oesterreichische Juristen-Zeitung.
ÖZÖR = Oesterreichische Zeitschrift für öffentliches Recht.
P. = Pacific Reporter (United States).
P. (or P.D.) = Probate, Divorce and Admiralty Division of the English High Court of Justice.
P.C.I.J. = Publications of the Permanent Court of International Justice: Reports of Judgments, Advisory Opinions, Orders, and Other Acts and Documents.
Q.B. (or Q.B.D.) = Queen's Bench Division of the English High Court of Justice.
Recueil des Décisions = Recueil des Décisions de la Commission de Conciliation Franco-Italienne (under Article 83 of the Peace Treaty with Italy, 1947).
R.P.C. = Reports of Patent Cases (England).
RzW = Neue Juristische Wochenschrift. Rechtsprechung zum Wiedergutmachungsrecht (Germany).
S.A.L.R. = South African Law Reports.
S.C.J. = Supreme Court Reports (Original Jurisdiction) (India).
S.Ct. = Supreme Court Reporter (United States).
Sirey = Recueil général des Lois et des Arrêts (founded by Sirey).
S.R. & O. = Statutory Rules and Orders published by authority (England).

SStr	= Sammlung der Entscheidungen des Obersten Gerichtshofes in Strafsachen (Austria).
SZ	= Sammlung der Entscheidungen des Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen (Austria).
T.L.R.	= Times Law Reports.
U.N.T.S.	= United Nations Treaty Series.
U.S.	= United States Reporter (Supreme Court).
U.S.C.A.	= United States Code Annotated.
VfGH	= Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofs (New Series) (Austria).
VwGH (A)	= Erkenntnisse und Beschlüsse des Verwaltungsgerichtshofes, New Series (Administrative Law) (Austria).
VwGH (f)	= Erkenntnisse und Beschlüsse des Verwaltungsgerichtshofes, New Series (Law relating to Finance) (Austria).

CLASSIFICATION

PART I

INTERNATIONAL LAW IN GENERAL

I. Nature and Binding Force.
II. Sources. *See also* Part X, Disputes: A, I, ii, Arbitration: The Law Applied by Arbitral Tribunals.
III. Subjects of International Law. *See also* Part VI, The Individual in International Law: A, In General; *and* Part VIII, Treaties: IX, Operation and Enforcement of Treaties.
IV. Relation to Municipal Law. *See also* Part VIII, Treaties: IX, Operation and Enforcement of Treaties, Necessity for Municipal Legislation; *and* Part VI, The Individual in International Law: A, In General.
V. International Comity.
VI. Miscellaneous.

PART II

STATES AS INTERNATIONAL PERSONS

A. IN GENERAL

I. The Beginning of State Existence. (For Recognition *see below*, D.)
II. Sovereignty and Independence—
  i. In Foreign Relations. *See also below*, IV, Recognition of Acts of Foreign States and Governments; Part IV, Jurisdiction; *and* Part VIII, Treaties: XII, Interpretation of Treaties, ii, Principles and Rules of Interpretation.
  ii. In Matters of Domestic Jurisdiction.
  iii. Conduct of Foreign Relations. Conclusiveness of Statements of the Executive.
  iv. Waiver of Rights. Estoppel.
III. Equality of States.
IV. Recognition of Acts of Foreign States and Governments. *See also below*, D, Recognition of States, Governments, Belligerency; *and* Part IV, Jurisdiction: I, Territorial.
V. Continuity of States. *See also below*, E, State Succession.
VI. Extinction of States.

B. COMPOSITE AND DEPENDENT STATES AND TERRITORIES

I. UNIONS OF STATES—
  - i. Federal States and Confederations.
  - ii. Other Unions (including Customs Unions).

II. BRITISH COMMONWEALTH OF NATIONS.

III. PROTECTED STATES AND PROTECTORATES. DEPENDENT STATES.

IV. MANDATED AND TRUST TERRITORIES—
  - i. Sovereignty over Mandated and Trust Territories. Status of Mandated and Trust Territories.
  - ii. Rights and Duties of the Administering Authority.
  - iii. Rights and Duties of the Supervisory Authority.
  - iv. Equality of Opportunity.
  - v. Nationality in Mandated and Trust Territories.
  - vi. Other Matters.

C. NEUTRALIZATION AND DEMILITARIZATION

D. RECOGNITION. *See also above,* A, IV, Recognition of Acts of Foreign States and Governments ; *and* PART IV, JURISDICTION : A, I, Territorial.

I. OF STATES.
II. OF GOVERNMENTS.
III. OF INSURGENCY.
IV. OF BELLIGERENCY.
V. OF ANNEXATION.
VI. CONDITIONAL RECOGNITION.
VII. IMPLIED RECOGNITION.
VIII. WITHDRAWAL OF RECOGNITION.

E. STATE SUCCESSION

I. SUCCESSION TO RIGHTS.
II. SUCCESSION WITH REGARD TO CONTRACTUAL AND OTHER OBLIGATIONS, AND CONCESSIONS.
III. THE PUBLIC DEBT. PENSIONS.
IV. SUCCESSION WITH REGARD TO OBLIGATIONS FOR DELINQUENCIES (TORTS).
V. RESPECT FOR PRIVATE RIGHTS.
VI. UPON TERMINATION OF A REBELLION.
VII. INTERNATIONAL CONVENTIONS.
VIII. IN MATTERS OF ADMINISTRATION. OFFICIALS.
IX. CONTINUITY OF THE LAW. JUDGMENTS OF COURTS. PENDING ACTIONS.
X. IN MATTERS OF EXTRADITION.

F. SUCCESSION OF GOVERNMENTS

I. IN GENERAL.
II. UPON TERMINATION OF A REBELLION.

G. MISCELLANEOUS

PART III

STATE TERRITORY

A. IN GENERAL

- I. NATURE OF TERRITORIAL SOVEREIGNTY.
- II. ACQUISITION OF TERRITORIAL SOVEREIGNTY—
  - i. Accretion and Accession.
  - ii. Occupation. Discovery. The Principle of Contiguity.
  - iii. Cession. Plebiscite.
  - iv. Prescription.
  - v. Conquest and Annexation.
- III. LOSS OF TERRITORIAL SOVEREIGNTY.
- IV. EFFECTS OF CHANGES OF SOVEREIGNTY. *See also* PART II, STATES AS INTERNATIONAL PERSONS : E, State Succession.
- V. OCCUPATION OF FOREIGN TERRITORY IN TIME OF PEACE.
- VI. INTERNATIONAL LEASES AND GRANTS IN PERPETUITY.
- VII. SOVEREIGNTY OVER THE AIR—
  - i. Air Navigation Conventions.
  - ii. Wireless Telegraphy, Telephony, etc. *See also* PART XI, WAR AND NEUTRALITY : D, Air Warfare.

B. PARTS OF STATE TERRITORY

- I. BOUNDARIES—
  - i. Land Boundaries.
  - ii. Water Boundaries.
- II. RIVERS—
  - i. National Rivers.
  - ii. Multi-national Rivers.
  - iii. International Rivers.
    - (*a*) The Principle of Freedom of Navigation on International Rivers.
    - (*b*) Functions and Competence of International Commissions on International Rivers.
  - iv. The Utilization of the Flow of Non-National and International Rivers.
- III. TERRITORIAL WATERS—
  - i. Nature of the Maritime Belt.
  - ii. Breadth and Delimitation of the Maritime Belt. Base Lines. Islands. Subsoil of Territorial Waters.
  - iii. Jurisdiction in the Maritime Belt.
  - iv. Innocent Passage.
  - v. Coasting Trade and Fisheries. *See also* PART IV, JURISDICTION : I, Territorial.
- IV. NATIONAL WATERS.
- V. CONTINENTAL SHELF.
- VI. STRAITS.
- VII. BAYS.
- VIII. INTERNATIONAL CANALS.
- IX. LAKES AND LAND-LOCKED SEAS.
- X. ISLANDS.
- XI. STATE SERVITUDES.
- XII. DEMILITARIZED ZONES.

C. MISCELLANEOUS

PART IV

JURISDICTION

A. IN GENERAL. TERRITORIAL AND PERSONAL

I. TERRITORIAL—

- i. Over Territory in General and Persons and Property Situated therein. Territorial Limits of Jurisdiction. Expropriation of Alien Property. *See also* PART II, STATES AS INTERNATIONAL PERSONS : A, IV, Recognition of Acts of Foreign States and Governments, *and* D, Recognition of States and Governments.
- ii. Criminal Jurisdiction over Foreigners.
- iii. Over Ports and National Waters. *See also* PART III, STATE TERRITORY : B, III, Territorial Waters.
- iv. At the Maritime Frontier. Hovering Laws. *See also below*, C, High Seas.
- v. Coasting Trade.
- vi. Fisheries.
- vii. Continental Shelf. *See also* PART III, STATE TERRITORY : B, V, Continental Shelf.
- viii. Exemptions from and Restrictions upon Territorial Jurisdiction.
    - (*a*) Foreign States. *See also* PART II, STATES AS INTERNATIONAL PERSONS : A, II, Sovereignty and Independence : iii, Conduct of Foreign Relations. Conclusiveness of Statements of the Executive.
    - (*b*) Heads of Foreign States.
    - (*c*) Public Ships and Other Property of Foreign States.
    - (*d*) Foreign Armed Forces.
- ix. Irregular Apprehension.

II. PERSONAL—

- i. Over Nationals in Respect of Crimes Committed Abroad.
- ii. Over Nationals Abroad or on the High Seas and their Property Abroad.

B. EXTRATERRITORIAL JURISDICTION : CONSULAR JURISDICTION. RÉGIME OF CAPITULATIONS.

C. HIGH SEAS

I. CONCEPTION OF THE HIGH SEAS AND OF THE FREEDOM OF THE SEA.

II. JURISDICTION ON THE HIGH SEAS.

- i. For Ensuring the Safety of Traffic. Collisions. Salvage. Pollution of the High Seas.
- ii. For Enforcement of International Conventions. Slave Trade.
- iii. Visit, Search and Arrest by Men-of-War in Time of Peace.
- iv. The Law Governing the Flag. Ship's Papers.
- v. The Right of Pursuit.
- vi. Enforcement of Hovering, Revenue and Other Municipal Laws.
- vii. Piracy. *See also* PART III, STATE TERRITORY : B, III, Territorial Waters ; VI, Straits ; *and* VII, Bays.

III. SUBMARINE CABLES.

D. THE AIR SPACE

E. MISCELLANEOUS

PART V

STATE RESPONSIBILITY

A. NATURE AND KINDS OF STATE RESPONSIBILITY

- I. IN GENERAL. ABSOLUTE RESPONSIBILITY AND RESPONSIBILITY BASED ON FAULT.
- II. FOR BREACHES OF TREATY OBLIGATIONS.
- III. FOR REVOCATION OF, OR INTERFERENCE WITH, CONCESSIONS OR CONCESSIONARY CONTRACTS.
- IV. FOR DEBTS.
- V. FOR OTHER BREACHES OF CONTRACTUAL OBLIGATIONS.
- VI. FOR WRONGS UNCONNECTED WITH CONTRACTUAL OBLIGATIONS—
  - i. Acts and Omissions of State Organs and Officials.
    - (*a*) Denial of Justice. Exhaustion of Legal Remedies.
    - (*b*) Executive Action or Inaction.
    - (*c*) Connected with Legislation.
    - (*d*) Plea of Non-Discrimination against Foreigners. *See also* PART IV, JURISDICTION: A, I, Territorial, i, Expropriation of Alien Property.
  - ii. Acts of Insurgents, Rioters and Private Individuals in General.
- VII. FOR ACTS AND OMISSIONS OF REVOLUTIONARY OR *DE FACTO* GOVERNMENTS.

B. CLAIMS

- I. IN GENERAL.
- II. NATIONALITY OF CLAIMS.
- III. ASSIGNMENT OF CLAIMS.
- IV. STATE CONTROL OVER PRIVATE CLAIMS.

C. PRESCRIPTION (EXTINCTIVE PRESCRIPTION)

- I. BEFORE INTERNATIONAL TRIBUNALS.
- II. EFFECT OF MUNICIPAL STATUTES OF LIMITATION.
- III. EFFECT OF WAR.

D. DAMAGES (MEASURE OF DAMAGES)

- I. AWARD OF DAMAGES IN GENERAL. GROUNDS FOR AWARDING DAMAGES.
- II. INDIRECT DAMAGE AND DAMAGES FOR LOSS OF PROFITS.
- III. PUNITIVE AND EXEMPLARY DAMAGES.

E. INTEREST

- I. IN GENERAL.
- II. RATE OF INTEREST. COMPOUND INTEREST.
- III. THE *DIES A QUO*. THE *DIES AD QUEM*.

F. MISCELLANEOUS

PART VI

THE INDIVIDUAL IN INTERNATIONAL LAW

A. IN GENERAL

- I. POSITION OF INDIVIDUALS IN INTERNATIONAL LAW. HUMAN RIGHTS AND FREEDOMS. *See also* PART I, INTERNATIONAL LAW IN GENERAL: IV, Relation to Municipal Law; *and* PART VIII, TREATIES: IX, Operation and Enforcement of Treaties.
- II. BEFORE INTERNATIONAL TRIBUNALS.

B. NATIONALITY

- I. IN GENERAL. PROOF OF NATIONALITY.
- II. ACQUISITION OF NATIONALITY. NATIONALITY AS AFFECTED BY CHANGES OF SOVEREIGNTY.
- III. AS DETERMINING THE RIGHT OF PROTECTION OF CITIZENS ABROAD. *See also* PART V, STATE RESPONSIBILITY: A, Nature and Kinds of State Responsibility; *and* B, II, Nationality of Claims.
- IV. PROTECTED PERSONS AND *DE FACTO* SUBJECTS.
- V. NATURALIZATION.
- VI. EXPATRIATION. LOSS OF NATIONALITY.
- VII. DENATIONALIZATION.
- VIII. DOUBLE NATIONALITY.
- IX. NATIONALITY OF MARRIED WOMEN.
- X. OPTION.
- XI. STATELESSNESS.
- XII. NATIONALITY OF CORPORATIONS. *See also* PART XI, WAR AND NEUTRALITY: A, VI, Enemy Character.

C. ALIENS

- I. ADMISSION OF ALIENS.
- II. POSITION OF ALIENS—
    - i. Subjection to Territorial Sovereignty of Receiving State.
    - ii. Protection by the National State.
    - iii. Treatment by and Responsibilities of the Receiving State. *See also* PART V, STATE RESPONSIBILITY.
    - iv. Plea of Non-Discrimination. *See also* PART V, STATE RESPONSIBILITY.
    - v. Respect for Property. Expropriation. *See also* PART IV, JURISDICTION: A, I, Territorial.
- III. EXPULSION OF ALIENS—
    - i. Right of Expulsion.
    - ii. Procedure of Expulsion.

D. EXTRADITION

- I. IN GENERAL.
- II. EXTRADITION OF NATIONALS.
- III. CONDITIONS OF EXTRADITION. EXTRADITABLE CRIMES.
- IV. PROCEDURE OF EXTRADITION.

V. POLITICAL CRIMES.
VI. MISCELLANEOUS.

E. MINORITIES (PROTECTION OF MINORITIES)

F. MISCELLANEOUS

PART VII

DIPLOMATIC AND CONSULAR INTERCOURSE AND PRIVILEGES

A. PERMANENT DIPLOMATIC ENVOYS
- I. APPOINTMENT AND RECEPTION OF DIPLOMATIC ENVOYS.
- II. POSITION AND FUNCTIONS OF DIPLOMATIC ENVOYS.
- III. PRIVILEGES AND IMMUNITIES OF—
  - i. Diplomatic Envoys and their Staff.
  - ii. Subordinate Members of the Diplomatic Staff.
  - iii. The Family and Retinue of Diplomatic Envoys.
  - iv. The Official Residence of a Diplomatic Envoy.
- IV. TERMINATION OF APPOINTMENT OF DIPLOMATIC ENVOYS.

B. SPECIAL ENVOYS: DELEGATES AT INTERNATIONAL CONFERENCES: TRADE DELEGATIONS

C. RIGHT OF OTHER PERSONS TO PRIVILEGES AND IMMUNITIES
- I. OFFICIALS OF THE UNITED NATIONS.
- II. REPRESENTATIVES SENT BY AND ACCREDITED TO THE UNITED NATIONS.
- III. DELEGATES OF STATES ATTENDING INTERNATIONAL CONFERENCES.
- IV. OFFICIALS OF INTERNATIONAL ORGANIZATIONS.
- V. JUDGES AND OFFICIALS OF THE INTERNATIONAL COURT OF JUSTICE AND OTHER INTERNATIONAL TRIBUNALS.

D. CONSULS
- I. APPOINTMENT AND EXEQUATUR.
- II. POSITION AND FUNCTIONS OF CONSULS.
- III. PRIVILEGES AND IMMUNITIES OF CONSULS.

E. MISCELLANEOUS

PART VIII

TREATIES

A. IN GENERAL
- I. CONCEPTION AND FUNCTION OF TREATIES.
- II. FORMS OF INTERNATIONAL AGREEMENTS: TREATIES. CONVENTIONS. GOVERNMENTAL AGREEMENTS. EXCHANGES OF NOTES. OTHER FORMS OF TREATIES.

B. CONCLUSION AND OPERATION OF TREATIES
- I. SIGNATURE. ACCESSION AND ADHESION. TACIT RENEWAL.

- II. CONDITIONS OF VALIDITY OF TREATIES. REGISTRATION OF TREATIES.
- III. PARTIES TO TREATIES. RIGHT TO CONCLUDE TREATIES. COMPOSITE AND DEPENDENT STATES AND TERRITORIES.
- IV. CONSTITUTIONAL LIMITATIONS.
- V. RESERVATIONS.
- VI. RATIFICATION OF TREATIES. ENTRY INTO FORCE.
- VII. OPERATION AND ENFORCEMENT OF TREATIES. NECESSITY FOR MUNICIPAL LEGISLATION. *See also* PART I, INTERNATIONAL LAW IN GENERAL: IV, Relation to Municipal Law; *and* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.
- VIII. EFFECT OF TREATIES ON THIRD PARTIES.

C. TERMINATION OF TREATIES

- I. BY OPERATION OF LAW.
  - i. In General.
  - ii. Extinction and Dismemberment of Contracting Party.
  - iii. Outbreak of War. *See also* PART XI, WAR AND NEUTRALITY.
  - iv. The *clausula rebus sic stantibus*.
- II. BY ACT OF PARTY.
  - i. In General.
  - ii. Mutual Consent. Revision of Treaties.
  - iii. Unilateral Denunciation. Result of Non-performance by the Other Party.

D. INTERPRETATION OF TREATIES

- I. AGENCIES OF INTERPRETATION.
- II. PRINCIPLES AND RULES OF INTERPRETATION.
- III. BILINGUAL TREATIES.
- IV. CONSIDERATION OF PREPARATORY WORK.
- V. MISCELLANEOUS.

E. SPECIAL KINDS OF TREATIES

- I. COMMERCIAL TREATIES. MOST-FAVOURED-NATION CLAUSE.
- II. PEACE TREATIES.

F. MISCELLANEOUS

PART IX

INTERNATIONAL ORGANIZATION AND ADMINISTRATION

A. INTERNATIONAL ORGANIZATION IN GENERAL

B. THE UNITED NATIONS

- I. LEGAL NATURE OF THE UNITED NATIONS. MEMBERSHIP.
- II. THE GENERAL ASSEMBLY.
- III. THE SECURITY COUNCIL.
- IV. OTHER ORGANS OF THE UNITED NATIONS.
- V. INTERPRETATION OF THE CHARTER OF THE UNITED NATIONS.

C. SPECIALIZED AGENCIES OF THE UNITED NATIONS

D. OTHER INTERNATIONAL ORGANIZATIONS AND ORGANS OF INTERNATIONAL ADMINISTRATION

E. INTERNATIONAL OFFICIALS

F. MISCELLANEOUS

PART X

DISPUTES

A. ARBITRATION

- I. In General—
  - i. Conception and Function of Arbitration.
  - ii. The Law Applied by Arbitral Tribunals.
  - iii. The Arbitration Treaty. Appointment and Withdrawal of Arbitrators.
- II. Procedure—
  - i. Procedure before the Tribunal (Oral and Written Arguments).
  - ii. Competence. Competence to Determine Jurisdiction.
  - iii. Intervention.
  - iv. Procedure.
- III. Evidence.
- IV. The Award—
  - i. Scope and Binding Force of the Award.
  - ii. Appeal and Revision.

B. INTERNATIONAL COURT OF JUSTICE

- I. Organization of the Court.
- II. Contentious Jurisdiction—
  - i. Competence.
  - ii. Procedure.
  - iii. The Law Applicable.
  - iv. Judgment.
- III. Advisory Jurisdiction—
  - i. Competence.
  - ii. Procedure.
  - iii. The Law Applicable.
  - iv. Opinion.

C. CONCILIATION

D. UNILATERAL MEANS OF REDRESS SHORT OF WAR: RETORSION. REPRISALS. PACIFIC BLOCKADE. INTERVENTION.

E. NEGOTIATION

F. MISCELLANEOUS

PART XI

WAR AND NEUTRALITY

A. WAR IN GENERAL

- I. Definition and Technical Meaning of War. Belligerency and Insurgency.
- II. Commencement of War.
- III. Region of War.
- IV. Belligerent Forces.
- V. Effects of Outbreak of War—
  - i. In General.
  - ii. On Treaties.
  - iii. On Private Contracts.
  - iv. On Enemy Subjects with regard to—
    - (*a*) Their Personal Status in the Territory of the Belligerent. *Persona standi in judicio.*
    - (*b*) Their Property and Other Rights.
  - v. On Enemy Merchant Ships in Port.
  - vi. On Neutral Persons and Property. The Right of Angary.
  - vii. Trading with the Enemy.
- VI. Enemy Character—
  - i. Of Individuals.
  - ii. Of Corporations.
  - iii. Of Ships.
  - iv. Of Goods.
- VII. The Binding Force of the Laws of War.
- VIII. Enforcement of the Laws of War—
  - i. Reprisals.
  - ii. Punishment of War Crimes and Crimes against Humanity. Defence of Superior Orders.
  - iii. Compensation and Reparation.
- IX. Prisoners of War.
- X. Treatment of Wounded.
- XI. Non-hostile Relations between Belligerents, especially Armistices.
- XII. Termination of War.
- XIII. Effects of Treaties of Peace—
  - i. In General.
  - ii. Amnesty.
  - iii. *Postliminium.*
  - iv. Miscellaneous.
- XIV. Performance of Peace Treaties.
- XV. Miscellaneous.

B. WARFARE ON LAND

- I. Measures and Instruments of Force.
- II. Appropriation, Utilization and Destruction of Enemy Property.
- III. Occupation of Enemy Territory—
  - i. Nature and Effects of the Occupation.
  - ii. Legislative, Judicial and Administrative Functions of the Occupant.

- iii. Respect for Private Property. The Public Property of the Enemy State. Requisitions and Contributions.
- iv. Inhabitants. Services. Deportations. Hostages.

C. WARFARE AT SEA

- I. MEASURES AND INSTRUMENTS OF FORCE.
- II. VISIT, SEARCH, CAPTURE AND DESTRUCTION—
  - i. Of Enemy Merchantmen.
  - ii. Of Neutral Merchantmen.
- III. RESTRICTIONS ON THE RIGHT OF CAPTURE (HOSPITAL SHIPS, ETC., POSTAL CORRESPONDENCE, PROPERTY UNDER NEUTRAL FLAG).
- IV. PRIZE LAW—
  - i. Nature and Extent of Jurisdiction of Prize Courts.
  - ii. Procedure.
  - iii. Indemnities and Damages.

D. CONTRABAND

- I. CONCEPTION OF CONTRABAND. ABSOLUTE AND CONDITIONAL CONTRABAND.
- II. CARRIAGE OF CONTRABAND AND DOCTRINE OF CONTINUOUS VOYAGE.
- III. PENALTY FOR CARRIAGE OF CONTRABAND.

E. BLOCKADE

- I. ESTABLISHMENT OF BLOCKADE. CONDITIONS OF VALIDITY.
- II. BREACH AND PENALTY.
- III. BLOCKADE AND THE DOCTRINE OF CONTINUOUS VOYAGE.

F. AIR WARFARE

G. NEUTRALITY

- I. NATURE AND DUTIES OF NEUTRALITY.
- II. NEUTRAL AND MILITARY AND NAVAL OPERATIONS AND PREPARATIONS.
- III. NEUTRAL ASYLUM.
- IV. SUPPLIES, LOANS AND SERVICES TO BELLIGERENTS.
- V. EFFECT OF THE CHARTER OF THE UNITED NATIONS.

PART I

INTERNATIONAL LAW IN GENERAL

II.—Sources

[See also Part X, DISPUTES: A, I, ii, ARBITRATION: *The Law Applied by Arbitral Tribunals*.]

Sources of International Law—Customary International Law—Acquiescence as Evidence of International Law.

See Case No. 36 (*Anglo-Norwegian Fisheries Case*).

International Law—Sources of—General Principles of Law—Interpretation of Concessionary Contract between Independent Ruler and Private Company.

See Case No. 37 (*Petroleum Development Ltd.* v. *Sheikh of Abu Dhabi*).

International Law—Sources of—Judicial Decisions of Municipal Courts as Evidence of International Law.

See Case No. 204 (*Gibbs et Al.* v. *Rodríguez et Al.*).

III.—Subjects of International Law

[See also Part VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, *In General*; and Part VIII, TREATIES: IX, *Operation and Enforcement of Treaties*.]

International Law—Subjects of—Committee of Private Persons Set Up by International Convention—Committee of Private Persons Participating in International Agreements—War—Effects of Outbreak of—Treaties Concerning Private Law Matters. **Case No. 1**

VIGOUREUX *v.* COMITÉ DES OBLIGATAIRES DANUBE–SAVE–ADRIATIQUE.

France, Tribunal Civil de la Seine. December 12, 1951.

THE FACTS.—This was an action by a holder of debentures of the Danube–Save–Adriatic Railway Company against four persons as representing the Committee of Debenture Holders of that Company. Under Agreements signed at Rome on March 29, 1923, by a number of States and private persons, in pursuance of the Peace Treaty of St.-Germain with Austria,

Case No. 1 *Contd.* 1919, which set up the Danube–Save–Adriatic Railway Company as successor to the South-Austrian Railway Company, the Committee of Debenture Holders was charged with the administration of funds which were maintained out of certain rentals and contributions and were used for the payment of interest on and for the redemption of the debentures. On the outbreak of the Second World War the Committee of Debenture Holders was in possession of funds which were never distributed. The purpose of the present action was to compel the Committee to distribute those funds as well as sums received or due after the outbreak of war. The main question before the Court was whether the Committee of Debenture Holders had legal personality, enabling it to be sued as such.

Held : that the Committee of Debenture Holders had legal personality since it had been set up and recognized by international conventions, that the Committee must distribute the funds held by it on behalf of debenture holders on the outbreak of war, but that the question of sums falling due after the outbreak of war must be left in abeyance until the negotiation of further arrangements, since the obligations of States had lapsed as a result of the outbreak of war. The Court said :

" The Treaty of Saint-Germain of September 10, 1919 (Article 320), and the Treaty of Trianon of June 4, 1920 (Article 304), empowered a committee to represent the holders of debentures, and thus conferred legal personality on that Committee. That Committee, represented by two of its members who signed ' for the Committee of Debenture Holders ', took part in the Rome Agreements of March 29, 1923, concluded in execution of the preceding Treaties, together with the High Contracting Parties. These Agreements laid down the name, composition, function and powers of the Committee. The Committee of Debenture Holders has legal personality in French law since the Treaties which created it were properly ratified and published in France, and since the Rome Agreements which laid down its purpose, while not signed by France, were taken in application of the provisions of these Treaties. Moreover, even if it were contended that the Committee which signed the Rome Agreements was not the same as that on which the Treaties of Saint-Germain and Trianon conferred legal personality, it may be pointed out that the States which negotiated those Agreements permitted the representatives of the Committee to discuss and sign with their own ministers, and conferred on the Committee the power to represent the debenture holders and to administer funds. These States thus necessarily and validly endowed that body with legal personality in international law. That personality is not contrary to French public policy. . . .

" In conformity with Articles 35, 37 and 38 of the Rome

Agreements, the Committee must distribute the funds which it holds on behalf of the debenture holders. At the same time, in conformity with those Articles it may take into account the expenses of administration of the funds.

"Furthermore, there must be left in abeyance the question of the disposal of 866,674 debentures acquired by Germany during the war by means of requisition or purchase for the purpose of returning them to the Company and thus redeeming its debt. That redemption was contrary to the Rome Agreements. It was made on the basis of the Brioni Agreement of August 10, 1942, which has already been declared invalid in respect of relations between France and Italy (Treaty of Peace, 1947, Appendix XVI, para. 15) and Hungary (Treaty of February 10, 1947, Article 26). Finally, since a declaration of war brings to an end reciprocal obligations assumed by States in a treaty—even though that treaty deals with private law matters and was concluded in consideration of a state of peace—there must be left in abeyance the question of dividends payable by the States signatories of the Rome Agreements, and received by the Committee after September 1, 1939, until new agreements determine the contribution to be made to the debenture fund by each of these States. . . ."

[Report: *Revue critique de Droit international privé*, 41 (1952), pp. 463–466.]

IV.—Relation to Municipal Law

[See also Part VIII, TREATIES: IX, *Operation and Enforcement of Treaties, Necessity for Municipal Legislation*; and Part VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, *In General*.]

International Law—Relation to Municipal Law—Authority of Judgment of Permanent Court of International Justice before a Municipal Court—Jurisdiction—Exemption from—Foreign States—Immunity from Execution—Economic Activities. **Case No. 2**

"SOCOBEL" *v.* GREEK STATE.

Belgium, Tribunal Civil de Bruxelles. April 30, 1951.

THE FACTS.—The plaintiff, a Belgian Company, had obtained garnishee orders attaching a number of debts owing to the Greek State with a view to satisfying a judgment debt owed to it by the Greek State under an Arbitral Award of July 25, 1936. The Greek State sought to have these orders set aside, on the grounds, first, of its immunity from execution, and, secondly, of the fact that the Arbitral Award had not obtained an exequatur in Belgium. With regard to the first argument, the plaintiff Company contended that the exemption claimed by the Greek State prejudiced local "economic independence", particularly in view of the development of economic activity by

Case No. 2 *Contd.*

States. With regard to the second argument, it advanced the contention that the Arbitral Award of 1936 had been confirmed in proceedings before the Permanent Court of International Justice in 1939 and that the decisions of that Court were binding in Belgium without exequatur, and sought on that basis to obtain payment of the attached sums to itself.

Held : that the garnishee orders were valid, but that payment to the plaintiff Company could not be ordered until it had received a judgment executory in Belgium. The Greek State was not entitled to immunity from execution with regard to its economic activities. On the other hand, the judgment of the Permanent Court of International Justice on which the plaintiff Company relied to obtain payment was not executory in Belgium. The Court said, in part :

" For the mere validation of garnishee orders it is not required that the judgment which it is sought to satisfy should previously have received an exequatur. On the other hand, the judgment creditor may when prohibiting garnishees from paying to the judgment debtor seek to have an order for payment to himself. . . . For this purpose the plaintiff Company claims that it has recovered judgment executory in Belgium, and that this judgment is constituted . . . by a decision of the Permanent Court of International Justice of June 15, 1939. . . .

" The plaintiff Company claims that that decision is binding in Belgium and exempt from the formality of exequatur. It must be noted, in the first instance, that the decision merely stated that in the view both of the Court and of the States before it, namely, Belgium and Greece, the Arbitral Award must be considered to be definitive and obligatory between the parties to the case. The Hague Court formally denied itself the right either to set aside or to confirm these awards. The importance of the decision in this dispute is accordingly diminished.

" The plaintiff Company claims that it cannot be conceived that a decision emanating from that International Court, which decides disputes between States, should require the exequatur of Belgian tribunals. *De lege ferenda* such an exemption from exequatur seems conceivable or even legitimate. However, at the present time, no international arrangement has introduced such a principle into the Belgian legal system. The plaintiff Company claims that the Permanent Court is not a ' foreign tribunal ' but a ' superior tribunal ', common to all States which have accepted its Statute, and that as such its decisions do not require exequatur. However, in the absence of an independent power of execution belonging to that Court, which would enable litigants before it to execute its decisions *de plano*, these decisions are not exempt from the servitude imposed on Belgian territory on decisions of other than Belgian tribunals.

" Moreover, the plaintiff Company cannot maintain that the decision of June 15, 1939, in a dispute between the Greek State and the Belgian State—taking up its case before the Hague Court—was a judgment in its favour even though it was not a party to the case. It is inconceivable that a party which, by definition, is not admitted to the bar of an international court should be able to rely on a judicial decision in a case to which it was not a party.

" Therefore, the plaintiff Company cannot yet be considered to have recovered an executory judgment for the purpose of obtaining the attached sums.

" With regard to the main claim for the validation of the garnishee orders, the Court must examine the relevance of the claim of immunity from execution. At the outset it is not without interest to emphasise that some writers and courts recognise an intrinsic connection between that immunity and immunity from jurisdiction from which it proceeds. The defendant put forward two arguments, one concerning the principle of the equality of States, and the other international comity.

" A. *Equality of States* :—Since Belgian legislation allegedly would not allow of execution against the Belgian State, the first defendant submits, *a pari*, that the same immunity should belong to foreign States in respect of their assets located on Belgian territory, and indicates that within its territory national property is immune from execution. This submission should be corrected, in that Belgian legislation generally makes no provision regarding forced execution of judgments against either the Belgian State or foreign States. In fact, the only positive provision relates to sea going vessels belonging to the State or those vessels which the State utilises or charters, and sets forth that such vessels shall be subject to normal rules of law in respect of both judicial proceedings and procedure. No *a contrario* argument can be derived from the fact that a Belgian law has introduced into the municipal law the substance of an international convention explicitly exempting vessels from legislation previously in force. In fact, the legislative authority recognised that in principle legislation to this effect was not necessary but merely useful as ' some government, engaging in maritime trade since the war ' had never claimed immunity. . . . The object of such legislation was to settle a particular question affecting the law of nations for internal purposes and with a view to international agreement . . . with respect to the Belgian State, writers merely indicate that execution is not possible. . . . From this point of view the argument of the first defendant appears to be theoretical. Indeed, it is established that the Belgian State acquiesces in final decisions and, in accordance with constitutional laws, provides in the budget of each government department the

Case No. 2 *Contd.*

amounts which they have been condemned to pay. . . . The impossibility of executing a judgment against the Belgian State arises from factors connected with Belgian internal public policy, *i.e.*, relating to the ' general interest ' of the Belgian community, to which ' the assets of the State are to be devoted ' and which ' should not be diverted from their purpose '. The general interest which attaches to the exemption from execution of the Belgian State on its own territory does not exist in the case of a foreign State which has transacted some *negotium* in Belgium. Such a State has subjected itself to Belgian laws and cannot claim to benefit from considerations of authority and prestige belonging in Belgium to those authorities which there exercise and must exercise sovereign power. The first defendant claims *de plano* the treatment deriving from the equality of States in order to enjoy in Belgium the status which is the particular prerogative of the Belgian State. The defendant does not answer the argument of the plaintiff that in opposing the execution of garnishee orders against it on Belgian territory, the defendant who argues on the basis of the independence of States in fact damages the local economic independence. . . . Thus the first defendant claims the benefit of considerations which pertain to the Belgian State inasmuch as it is responsible for internal public order, but which do not pertain to the defendant. In support of their claims, the plaintiff as well as the first defendant rely on the authority of writers and court decisions. Conflicting opinions on the matter at hand should not be counted but weighed. Their bearing on the present case depends on the concrete aspects of the case. This is all the more relevant because such opinions do not relate to the interpretation of written law but to custom, which is subject to the evolution of those factors from which it originated. In the last analysis, according to these opinions . . . it is not correct to assert that writers and jurisprudence are unanimous on the subject. . . . The first defendant relies on old decisions and writers' opinions which until very recently had wide currency in our courts. It is, however, necessary to observe that the contentions of the plaintiff can claim the support of opinions and precedents which, while they are not as old-established as those adduced by the defendant, have steadily been gaining ground from 1885 until to-day . . . the foregoing suffices to indicate that it would be wrong to advance that the Tribunal does not have authority, having regard to contemporary evolution as well as the absence of any indication of opinion, on the part of the Supreme Court, to take such evolution into account. Indeed, the Cour de Cassation itself is not bound by its own decisions, but must on the contrary reconsider matters afresh whenever they are brought before it. . . . It is meet to remark that the foregoing opinion refers to the interpretation of written law, which is outdated by the evolution of situations and opinions, while the question before the Tribunal pertains merely to the scope of a customary rule. The first defendant had no reply to make to the important and relevant argument of the plaintiff that the evolution of contemporary court decisions is dominated by the established fact of the increasing development of the activities of the modern State which affect in a positive and even direct manner the fields of commerce and the international economy. The defendant has not been able to dispute the fact that since the decision of January 22, 1849, of the Cour de Cassation of France, this development has become ever more pronounced. It would have been difficult to do so, since Law No. 4 of November 28, 1928, originated in that development, as indicated by its authors. . . . It is this outdated idea of a ' Police State ' which an eminent law officer condemned in his submissions made prior to the decision of June 11, 1903, of the Cour de Cassation of Belgium, when he invited the Court to annul a decision by the lower Court ' whose eyes were turned towards the past ' whereas it was for the Cour de Cassation to lay down the law ' account being taken of the present only, and with the eyes towards the future '. This eminent law officer further maintained that it was evident that ' execution was the necessary consequence of jurisdiction '. . . . It is hard to see why the Greek State which is a ' person at civil law on its own territory should be regarded as a sovereign person beyond the confines of its borders, the terms of the Agreement remaining unaltered, and the only change affecting the nationality of the judge called upon to settle the dispute '. . . . The fact that even on its own territory the status of the State as a person at civil law cannot fully be equated to that of private persons or bodies is without relevance. . . . It is the interlocking of economic relationships between modern States which led a well-known jurist to come to the following conclusions having regard to international order as well as the necessity of legal intercourse between States : ' The *fundamental* relationship between States is not their mutual independence, but the recognition and respect of their sovereignty. . . . The external independence of the State *only* becomes a concrete, tangible fact within the internationally accepted limits of its sovereign authority, it is therefore only a consequence deriving from the mutual respect of sovereignty ' (Ch. de Visscher, " Les Gouvernements étrangers en justice ", in *Revue de Droit international et de Législation comparée*, 1922, p. 311). The foregoing endorses the principle that the sovereignty of a State is not absolute, towards which other States could only adopt an attitude of unconditional acceptance. Such a view, which the defendant did not put forward, would be contrary to the very idea of an orderly international society. It is wrongly, therefore, that the defendant claims—on the basis of the equality of States or even

Case No. 2 *Contd.*

of the independence of States in the international society—immunity from execution in respect of judgments passed by Belgian courts which are likely to affect its private interests. The defendant in so doing endeavours to eschew the effective dominion of a jurisdiction of which, no more than the Belgian State when legal proceedings are instituted against it, it does not dispute the competence, but attempts to avoid its consequences in fact as well as in law, unlike the Belgian State. The defendant thus attempts to claim for its own benefit recognition of a status which the Belgian State, which voluntarily executes judgments against itself on its own territory, denies itself out of respect for judicial decisions. Finally, as a matter of positive law, the sovereignty of a foreign State stops at its frontiers, subject to such exceptions as are necessary to allow of free diplomatic representation abroad. The arguments put forward by the defendant are without relevance to this concept.

" B. *International comity.*—With respect to the unwritten principle of courtesy between the two States concerned, referred to by the defendant, it is established that their relations have not been affected by the arbitral procedure, the conditions of which had been laid down by themselves. The Arbitrators did not fail to appeal in their Award to the spirit of conciliation of the parties. The judgment of the Permanent Court of International Justice made a similar appeal. The defendant relies on international courtesy to deprive of its effect the judgment of a Belgian tribunal, the jurisdiction of which it does not contest. The defendant thus recognises that in itself the procedure followed before this tribunal . . . is without effect on its legal relations, present or future, with the Belgian State. Since mutual confidence is essential to commercial transactions, whether national or international, their course cannot in fact be affected by a judgment which recognises them and ensures their execution against foreign assets located in Belgium. It should not be overlooked that if these assets were attached at all, this was so as a result of transactions which the defendant thought fit to carry out in Belgium. It is established that the first defendant alone claims the benefit of the customary rule of international courtesy. For the purpose of diplomatic intercourse, the technical term ' courtesy ' implies reciprocity. Such reciprocity does not exist as far as the first defendant is concerned, because although it recognizes, as does the Belgian State, the jurisdiction of the courts of that country, it feels able to decline in Belgium execution against assets there located which the Belgian State would voluntarily accept in like circumstances. It must be concluded that the defendant feels itself justified in claiming execution in Belgium of the judgments recovered as a plaintiff, and in holding itself legally exempt from execution in respect of those judgments which condemned it as a defendant. There is no argument which would justify the Tribunal in refusing the validation of garnishee orders to which a Belgian company is legally entitled because such validation might prejudice the interests of a foreign State brought before our courts by a Belgian national."

[Report: *Revue critique de Droit international privé*, 41 (1952), pp. 111 *et seq.*]

International Law—Relation to Municipal Law—Whether Agreement between Governments Confers Benefits on Individuals—Claims Settlement Agreement of June 21, 1947, between Governments of United States of America and Austria —Competence of Municipal Courts to Determine Claims by Individuals—The Law of Austria. **Case No. 3**

IRRESBERGER AND ANOTHER *v.* REPUBLIC OF AUSTRIA.

Austria, Constitutional Court. October 8, 1951.

THE FACTS.—The Claims Settlement Agreement of June 21, 1947, between the Governments of the United States of America and the Republic of Austria (*U.N.T.S.*, vol. 67, p. 89) provided, as far as here material, for the payment, by the Government of the United States of America to the Government of the Republic of Austria, of a sum of money out of which the Government of Austria was to pay compensation to individuals in respect of damage caused to their property by members of the United States armed forces between April 9, 1945, and June 30, 1947. By a judgment dated June 26, 1951, the Constitutional Court held that the determination of claims to compensation fell within the competence of the civil courts (and not of the Constitutional Court or the administrative authorities).[1] The plaintiffs' property had been damaged by members of the United States armed forces, and the plaintiffs brought an action for damages in the Civil Court of Salzburg. The latter Court (before the date of the judgment of the Constitutional Court here referred to) refused to exercise jurisdiction, on the ground that the claim was based on an alleged tort by the sovereign authority of the Occupying Power, and further on the ground that the Agreement between the two Governments was not a contract conferring benefits on individuals which would entitle the plaintiffs to pursue an action in the civil courts.

Held: that the judgment of the Civil Court of Salzburg must be reversed and the case sent back to that Court in order to be determined on the merits. The Court said:

" This Court, in the judgment of June 26, 1951, has already dealt with the question as to whether the plaintiffs' claim has to be determined by the civil courts, the Executive or the Constitutional Court. It reached the conclusion that claims of

---

[1] *Cf. Pillage of Schloss Gumpenstein Case, VfGH*, 16 (1951), p. 182.

Case No. 3 *Contd.*

the kind with which we are concerned in the present case are to be regarded as claims for damages which, in accordance with Section 1338 of the Civil Code, must be brought, ' as a general rule, like any other civil claim ', before the civil courts. A deviation from this rule is only permissible where a special statute makes express provision to that effect. As there is no such special statute, the competence of the civil courts remains unaffected. . . . It follows that the civil courts have to determine the plaintiffs' claim. Accordingly, the order of the Civil Court of Salzburg of June 1, 1951, which runs counter to such determination, must be reversed."

[Report: *VfGH*, 16 (1951), p. 305.]

Case No. 4

International Law and Municipal Law—Interpretation of Municipal Statute—Duty of Court to Apply Municipal Statute even if Contrary to International Law.

STEINBERG *v.* ATTORNEY-GENERAL.

Israel, Supreme Court sitting as the Court of Criminal Appeals. July 19, 1951.

(Judges Agranat, Zussman and Zohar.)

THE FACTS.—In an appeal from a conviction by the Jerusalem District Court on a charge of failing to report for military service in accordance with the law in force, the appellant argued that by international law, the Israel Defence Service Law was not enforceable in Jerusalem as that was " occupied territory " (*cf. Attorney-General of Israel* v. *Sylvester, Annual Digest*, 1948, at p. 573, regarding the territory of the State of Israel).

Held: that the question of liability to military service and the penal consequences of failure to report were determined exclusively by municipal law. The Court said:

" It is a well-known rule that in interpreting a statute the Court will as far as possible try to avoid a conflict between the municipal law and the obligations incumbent on the State by virtue of international law. But this is only one of the canons of interpretation. That is to say, where we are dealing not with the Common Law [the principles of the Common Law, in certain circumstances, form part of the law of Israel—translator] but with a written statute which expresses the will of the legislator, then the Court must carry out the will of the legislator without considering if there exists a contradiction between the statute and international law. It may well be that international law imposes a certain obligation on the State. But since international law concerns not the relations of a State to its citizens, but a State's relations with other States, it follows that such obligations are for the benefit of other States, while the individual citizen is granted no right to insist upon the carrying out of the obligation. Furthermore, the Courts here derive their jurisdiction from municipal law and not from international law. Consequently, whenever a person is called upon to plead to a charge of infringing the municipal law, he cannot seek to defend himself by reference to international law, for the courts apply municipal law, and not international law, in deciding as between an individual and the State. See *Théophile* v. *Solicitor-General*, *Annual Digest*, 1949, Case No. 32. . . . In the present case the Defence Service Law states that a person whose ordinary place of residence is within the territory in which the law of the State of Israel applies is liable to military service. The Law purposely does not mention the territory of the State but the territory in which the law of the State applies, and Jerusalem is within this territory.

" For these reasons, even if we were to accept the appellant's argument that to impose liability for military service on the inhabitants of Jerusalem is contrary to international law—and on this we express no opinion—this would not exempt the appellant from the provisions of the Law."

[Reports: *Piskei-Din*, vol. 5 (1951), p. 1061; *Pesakim Elyonim*, vol. 6 (1951–1952), p. 26.]

International Law—Relation to Municipal Law—Municipal Law in Conflict with Treaty—Municipal Law Enacted Subsequent to Treaty—Whether Provisions of Treaty or Municipal Law Apply—The Law of Luxemburg. **Case No. 5**

DIEUDONNÉ *v.* ADMINISTRATION DES CONTRIBUTIONS.

Luxemburg, Conseil d'État. July 28, 1951.

THE FACTS.—The appellant, a Belgian national domiciled in Belgium, was employed by a company whose registered office was in Luxemburg. By virtue of the relevant provisions of the Double Taxation Agreement between Belgium and Luxemburg of March 9, 1931, the appellant's so-called fiscal domicil was in Belgium. After the liberation of Luxemburg from German occupation in 1944, the Government of Luxemburg decided to keep in force a revenue law enacted by the Germans and then operative in Luxemburg which provided, as far as here material, that the fiscal domicil of persons domiciled in Belgium and employed by Luxemburg companies was in Luxemburg, and not in Belgium. The appellant, in accordance with this Law, was assessed to tax by the Luxemburg authorities as a person with a fiscal domicil in Luxemburg. He appealed against the assessment.

Held: that the appeal must be allowed; the Belgo-Luxemburg Agreement of March 9, 1931, took precedence of the

Case No. 5 *Contd.* Luxemburg Law subsequently enacted (*i.e.*, kept in force by the Luxemburg authorities), and the appellant's fiscal domicil was accordingly in Belgium. The Court said :

" The application of the provisions of this law would violate the Belgo-Luxemburg Agreement of 1931 ; this Agreement provides that Brussels is the fiscal domicil of the appellant. Where a conflict arises between the provisions of an international treaty which has binding force in our country and the provisions of a municipal law, the former take precedence and preclude the application of provisions to the contrary of a municipal law, even if the latter have been enacted subsequently. The existence of the appellant's fiscal domicil in Brussels by virtue of the Belgo-Luxemburg Convention of 1931 precludes the simultaneous existence of a fictitious domicil in the Grand-Duchy and results in the rejection of the conclusions which have been drawn from this fiction."

[Report : *Pasicrisie luxembourgeoise*, vol. XV, p. 263.]

Case No. 6

International Law—Relation to Municipal Law—Treaties and Generally Recognized Rules of International Law—Geneva Conventions on Treatment of Prisoners of War—The Law of Luxemburg.

H. AND OTHERS *v.* PUBLIC PROSECUTOR.

Luxemburg, High Court of Justice (*Criminal Appeals*). *November* 18, 1949.

THE FACTS.—The appellants, former members of the German Security Police, were convicted by a Luxemburg War Crimes Court of war crimes committed in Luxemburg while that country was under German occupation during the Second World War. In their appeals against conviction they contended that the War Crimes Court, which had been set up specially for the trial of war crimes, lacked jurisdiction over prisoners of war who, by virtue of the Geneva Conventions of 1929 and 1949 or alternatively by virtue of the generally recognized rules of international law, were entitled to be tried by the same tribunals as members of the armed forces of the detaining Power, *viz.* Luxemburg, and that as they had not been so tried their convictions should be quashed. The prosecution contended that as the Geneva Conventions had not been approved by the Parliament of Luxemburg so as to become part of the municipal law of that country, they were not binding on the Luxemburg courts ; that in so far as concerned the generally recognized rules of international law, the High Court was not entitled to consider an appeal based on their alleged violation, its jurisdiction being confined to appeals against laws enacted in

Luxemburg ; and that accordingly the Court could not interfere with the convictions of the appellants.

Held: (i) that the Geneva Conventions had not been approved by the Parliament of Luxemburg and did not therefore form part of Luxemburg law ;

(ii) that the High Court was not entitled to adjudicate upon appeals based on alleged violations of other than Luxemburg law, and was not therefore entitled to consider an appeal based upon the alleged violation of general rules of international law ;

(iii) that as the appellants had been handed over to the Luxemburg authorities as suspected war criminals, and not as prisoners of war, the special War Crimes Court was entitled, in any event, to exercise jurisdiction over them ;

(iv) that, accordingly, the convictions must stand.

The Court said : " The Geneva Conventions of July 27, 1929, and August 12, 1949, on the Treatment of Prisoners of War, provide in Articles 92 and 138, respectively, that their entry into force is subject to the prior deposit of at least two instruments of ratification, and that they become binding upon each Contracting Party six months after the deposit of that Party's instrument of ratification. The judgment under appeal, which finds that these Conventions have not yet received the approval of Parliament as required by Article 37 of the Constitution, is therefore right in holding that they lack binding force. The first part of the first ground of appeal is therefore ill-founded."

The Court then dealt with the ground of appeal based upon the alleged violation of the generally recognized rules of international law, and continued : " Having regard to the fact that the function of the Court is limited to the punishment of specific violations of the law, it follows that violation of the rules of international custom does not give rise to an appeal unless such rules have been laid down in a provision of municipal law. This ground of appeal is therefore inadmissible."

[Report : *Pasicrisie luxembourgeoise*, vol. XIV, p. 593.]

International Law—Relation to Municipal Law—Treaty of Economic Union—Municipal Law in Conflict with a Treaty—The Law of Luxemburg.

See Case No. 122 (*Public Prosecutor* v. *Brasseur*).

International Law—Relation to Municipal Law—Hague Regulations Concerning the Laws and Customs of War on Land—Treaty Restating Customary International Law—Implied Incorporation in Municipal Law—The Law of Italy.

See Case No. 213 (*Ministero Difesa* v. *Ambriola*).

International Law—Relation to Municipal Law—Articles 3 and 52 of the Hague Regulations Concerning the Laws and Customs of War on Land—Treaty followed by Implementing Legislation —Whether Creating Individual Rights—The Law of Italy.

See Case No. 192 (*Soc. Timber* v. *Ministeri Esteri e Tesoro*).

International Law—Relation to Municipal Law—Hague Regulations Concerning the Laws and Customs of War on Land—Treaty Restating Customary International Law—Implied Incorporation in Municipal Law—The Law of Italy.

See Case No. 102 (*Ex parte Stenger*).

International Law—Relation to Municipal Law—Extradition—Conditions of—Extraditable Offences.

See Case No. 121 (*In re Daem*).

International Law—Relation to Municipal Law—Inter-Governmental Agreement to Compensate Owner of Requisitioned Property—Duty of Compensation Devolving on Government of Occupied Country—Whether Owner Entitled to Enforce Claim by Action in Municipal Courts.

See Case No. 218 (*Bäcker* v. *Austrian Federal Treasury*).

International Law—Relation to Municipal Law—Presumption of Legislative Intention not to Derogate from International Law —The Law of the United States of America.

See Case No. 152 (*Peters* v. *McKay*).

V.—International Comity

Case No. 7 **International Law—Comity—Distinguished from Reciprocity—Recognition of Certificate Issued by Foreign Private Professional Society.**

Sison *v.* The Board of Accountancy and Ferguson.

Philippines, Supreme Court. December 31, 1949.

The Facts.—This was an action to revoke the public accountant's certificate issued to the defendant Ferguson without examination. The Board of Accountancy of the Philippines had issued the certificate on the basis of his possession of a certificate issued by a private accountants' society in England. The petitioner alleged that Ferguson was a British subject and that there did not exist any reciprocity between the Philippines and the United Kingdom regarding the practice of accountancy, as required by the Philippine Statute (s. 12, Act No. 3105, as amended) which provided :

> "Any person who has been engaged in professional accountancy work in the Philippine Islands for a period of five years or more prior to the date of his application, and who holds certificates as certified public accountant, or as chartered accountant, or other similar certificates or degrees in the country of his nationality, shall be entitled to registration as certified public accountant and to receive a certificate of registration as such certified public accountant from the Board, *Provided* such country or state does not restrict the right of Filipino certified public accountants to practise therein or grants reciprocal rights to Filipinos. . . ."

The British Minister accredited to the Philippine Republic had submitted two Notes to the President of the Philippines, stating that the accounting profession was regulated by private societies rather than by the British Government and that these societies imposed no restrictions on the basis of nationality. His Majesty's Principal Secretary of State for Foreign Affairs was quoted as stating that qualified Philippine citizens were allowed to practise the profession of accountancy in the United Kingdom.

Held: that the petition to revoke the defendant's certificate must be denied. The entitlement of the defendant to practise accountancy in the Philippines is based upon comity rather than upon reciprocity, as that principle is known in international law. The Court said :

" In the case at bar, while the profession of certified public accountant is not controlled or regulated by the Government of Great Britain, the country of origin of respondent Robert Orr Ferguson, according to the record, said respondent had been admitted in this country to the practice of his profession as certified public accountant on the strength of his membership of the Institute of Accountants and Actuaries in Glasgow (England), incorporated by Royal Charter, 1855. The question of his entitlement to admission to the practice of his profession in this jurisdiction, does not, therefore, come under reciprocity, as this principle is known in International Law, but is included in the meaning of comity, as expressed in the alternative condition of the proviso of the above quoted section 12 which says : *such country or state does not restrict the right of Filipino certified public accountants to practise therein.*

" *Mutuality, reciprocity, and comity as bases or elements.*—International Law is founded largely upon mutuality, reciprocity, and the principle of comity of nations. Comity, in this connection, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will on the other ; it is the recognition which one nation allows within its territory to the acts of foreign governments and their tribunals, having due regard both to international duty and convenience and to

Case No. 7 *Contd.* the rights of its own citizens or of other persons who are under the protection of its laws. The fact of reciprocity does not necessarily influence the application of the doctrine of comity, although it may do so and has been given consideration in some instances. (30 Am. Jur., 178 ; *Hilton* vs. *Guyot*, 159 U. S., 113, 40 Law. ed., 95 ; 16 S. Ct., 139.)

" In *Hilton* vs. *Guyot* (*supra*), the highest court of the United States said that comity ' is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws '. Again, in *Bank of Augusta* vs. *Earle*, 38 U. S., 13 Pet. 519, 589, Chief Justice Taney, speaking for the court while Mr. Justice Story—well-known author of the treatise on Conflict of Laws—was a member of it, and largely adopting his words, said :

'. . . It is needless to enumerate here the instances in which by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. . . . The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interest. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. . . . It is not the comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided.'

. . . . .

" We are bound to take notice of the fact that the Philippines and the United Kingdom, are bound by a treaty of friendship and commerce, and each nation is represented in the other by the corresponding diplomatic envoy. There is no reason whatsoever to doubt the statement and assurance made by the diplomatic representative of the British Government in the Philippines, regarding the practice of the accountancy profession in the United Kingdom and the fact that Filipino certified public accountants will be admitted to practise their profession in the United Kingdom should they choose to do so.

" Under such circumstances, and without necessarily construing that such attitude of the British Government in the premises, as represented by the British Minister, amounts to reciprocity, we may at least state that it comes within the realm of comity, as contemplated in our law."

[Report : 47 *Off. Gaz.* 2932 (1951).]

PART II

STATES AS INTERNATIONAL PERSONS

A—IN GENERAL

I.—The Beginning of State Existence

[For *Recognition* see below, D.]

Statehood—Beginning of State Existence—Existence of a State Notwithstanding Non-Recognition—Protection of Rights of—Succession of States—Extinction of States—British Commonwealth of Nations—Indian States—The Union of India—Merger with—The Constitution and The Law of India. **Case No. 8**

STATE OF SERAIKELLA AND OTHER STATES *v.* UNION OF INDIA.

India, Supreme Court (*Original Jurisdiction*).
(Kania C.J. ; Patanjali Sastri, Mahajan, Das, Bose JJ.)
April 6, 1951.

THE FACTS.—The Rulers of certain States of the former Eastern Agency filed an action in the Federal Court on January 16, 1950, a few days before the Constitution of India came into force. The substance of their action was that " the merger and taking over of the administration of the territories concerned carried out in the purported exercise of powers conferred by the States Merger (Governor's Provinces) Order, 1949, made by the Governor-General of India " was a breach " of the terms of the Instrument of Accession executed by the Rulers and accepted by the Governor-General in August, 1947, which continued the sovereignty of the Ruler in and over the State and that all notifications, orders or enactments issued or made in violation of the rights and obligations flowing out of the Instruments of Accession were *ultra vires*, void and inoperative ".

The facts which gave rise to this action were that, when the States concerned had accepted the terms of accession and thereby become merged with the Union of India, the Indian Government proceeded to govern their territories as part of the States of Bihar and Orissa, so that, in effect, the identity of the plaintiff States was lost or obscured by the merger. The plaintiffs alleged that this was contrary to the terms of the

Case No. 8 *Contd.* Instruments of Accession to which they had been parties. On behalf of the Indian Union it was contended that by virtue of their merger with the Union the plaintiff States had ceased to exist as legal persons and hence that their cause of action was not maintainable. Once they had surrendered their rights as States they could not rely on the instrument of surrender to support any other rights which they were alleged to possess.

Held: that the Supreme Court had no jurisdiction because, *inter alia*, the State of Seraikella and the other plaintiffs had ceased to exist in the eyes of the Constitution of India by which the Court was bound, and hence that as legal persons these States did not exist for the purposes of the jurisdiction of the Court. The withdrawal of recognition from these States by the Government of India caused them to cease to exist in the context of Indian law. Moreover, a State that has neither territory nor subjects (these having been absorbed by another State), whatever notional existence it might still have, could not be said to have such legal capacity as was necessary for the enforcement of its political rights. It was not necessary for the Court " to consider whether in international law there may be a State without any territory or without any subject . . . ".

The Court said (*per* Kania C.J.) : ". . . I think it is essential to bear in mind the political background. Prior to August 1947, British India, as it was then described, was governed under the Government of India Act, 1935. Indian States, as they were then described, were independent States not governed by the Government of India. They were under the suzerainty of His Majesty the King and their administration was controlled under the advice of the Political Department of the Government of India, on the footing that the King was the Sovereign and had the right to exercise suzerain powers over those States. On the passing of the Indian Independence Act, 1947, from the 15th August, 1947, the British Parliament and the King ceased to have power to make any laws for India or make any changes in its Constitution. These were left for India. As regards the Indian States, while provision continued in the Government of India Act for the Rulers signing instruments of accession, no suzerain rights were given to the Dominion of India by the Indian Independence Act. If, therefore, the Dominion of India or any of these States committed acts of aggression or territorial trespass, there was no law the enforcement of which could give either party relief and there was no Court also which could give such relief. Section 204 of the Government of India Act also did not provide any relief to any of these Indian States unless they signed an Instrument of Accession. With the passing of the Constitution of India, India became a Sovereign Independent Republic. If that Dominion or Republic committed any acts of aggression towards a neighbouring Indian State . . . the Supreme Court has no jurisdiction to give relief to the Indian State. . . ."

The Chief Justice then continued: "The plaintiff contends, firstly, that it had signed the Instrument of Accession through its Ruler. The State next complains that, acting beyond the powers given over under the Instrument of Accession, the Dominion of India and the State of Bihar are trespassing wrongfully on its legislative and executive functions, that the Dominion of India and the State of Bihar are making laws which they have no power to make, having regard to the Instrument of Accession, and are wrongfully interfering with the administration of the State beyond the rights given to them under the Instrument of Accession. The whole plaint is nothing else except the claim to enforce the plaintiff's right under the Instrument of Accession. . . . According to the defendants, the situation in those circumstances [*i.e.*, as alleged by the plaintiffs] will be of a Sovereign Independent State trespassing on the territories, powers and privileges of another neighbouring independent State. To redress a grievance arising out of such action on the part of the defendants, the Supreme Court is not the form to give relief."

Bose J. concurred.

Per Patanjali Sastri J.: "The Constitution says that the territories of Bihar and Orissa shall comprise the territories specified in Part A, and this Court must accept that position. None of these States is included amongst the States named in Parts A, B and C. Our Constitution does not recognise any of these States as an Acceding State. The Government of India Act which recognised them as Acceding States has been repealed. Therefore, the plaintiff States have no existence in the eyes of the Constitution and cannot come to this Court to enforce their political rights. It is not necessary to consider whether in international law there may be a State without any territory or without any subject such as many of the States which during the last war had been overrun by invaders and which functioned in foreign countries, claimed to be. The problem before us is quite different. The States which are plaintiffs . . . ceased to be Acceding States by reason of the Merger Agreement of December 1947, admittedly concluded by their respective Rulers. In any event, our Constitution has quite clearly eliminated these States as such by absorbing their territories with the States of Bihar and Orissa. As our Constitution does not recognise these States as Acceding States or even as States, this Court cannot recognise these States or their political rights. These cases may have been within the jurisdiction of the Federal Court when they were instituted, but since then the Government of India Act has been repealed and the new Constitution has come into force. Under the Constitution, these

Case No. 8 *Contd.* States do not exist at all. . . . The suits must, therefore, be regarded as having abated by reason of the elimination of the plaintiff States as States or Acceding States just as an ordinary suit would abate on the death of a plaintiff. . . ."

[Report: (1951) *S.C.J.*, p. 425.]

States—Beginning of State Existence—Trial in Israel in respect of War Crimes and Crimes against Humanity Committed during Second World War.

See Case No. 169 (*War Crimes Cases* (*Israel*)).

States—Beginning of Existence of—Whether Possible to Leave a State before its Existence.

See p. 264 (*Khalidi* v. *Minister of the Interior*).

II.—Sovereignty and Independence

Case No. 9

States—Sovereignty and Independence—State-Owned Foreign Company—Whether a Foreign " National "—*Cautiò judicatum solvi*—Actions of a Private Law Character—Whether Covered by Hague Convention on Civil Procedure, 1905.

KUNSAGI SZOEVOEGYAR *v.* NAGIMIHALY, COURT OF APPEAL AND COURT OF CASSATION OF THE CANTON OF ZÜRICH.

Switzerland, Federal Tribunal. April 25, 1951.

THE FACTS.—The plaintiff Company was a Hungarian nationalized commercial concern. It had brought an action in the District Court of Hogen, Canton of Zürich, which was dismissed. It had thereupon appealed to the Court of Appeal. The Court of Appeal insisted on the payment of a *cautio judicatum solvi* as a condition prior to hearing the appeal. The plaintiff Company thereupon appealed to the Court of Cassation against this requirement. It invoked Article 17 of the Hague Convention on Civil Procedure, 1905, which provides that the nationals of a contracting party shall not be required to pay a *cautio judicatum solvi* in the courts of another contracting party by reason of the fact that they are aliens or that they are not domiciled or resident in the territory of that party. The Court of Cassation rejected the appeal on the grounds that the plaintiff Company was owned by the State and that the State could not rely on Article 17 of the Hague Convention, which applied only to the " nationals " of a contracting party and not to the contracting party itself. This was an appeal from that decision. It was contended on behalf of the appellant that the term "nationals" included legal persons, and that the State, acting in a private law capacity, must be treated as such a legal person.

Held: that the appeal must be allowed and the decision of the Court of Cassation quashed. The State, acting in a private law capacity, was entitled to the benefit of Article 17 of the Hague Convention on Civil Procedure, 1905. The Court said, on this point :

"Article 17 of the Hague Convention provides that the 'nationals' of one of the contracting parties shall not be required to pay a *cautio judicatum solvi* in the courts of another contracting party by reason of the fact that they are aliens, or that they are not domiciled or resident in the territory of that contracting party. It is generally accepted that the term 'nationals' covers not only natural persons who are citizens of a contracting party, but also legal persons of private or public law who have their seat in the territory of one of the contracting States. Accordingly, the Federal Tribunal has always admitted that legal persons may invoke Article 17 of the Hague Convention (*cf.* BGE 58, I, 307 ff. ; 61, I, 308 ff.). On the other hand, the question whether the contracting States are themselves exempt from payment of a *cautio judicatum solvi* has never yet been decided either by the Federal Tribunal or, apparently, by foreign courts. The decision of the Court below answers this question in the negative. It relies on a decision of the Court of Appeal of Zürich (Bl.Z.R. 49, No. 13), which, in turn, referred to the terms of the Treaty provision and to an earlier decision of the Federal Tribunal (BGE 44, I, 78) establishing the principle, with reference to Article 17 of the Hague Convention, that a liberal interpretation, going beyond the clear terms of a treaty provision, can only be admitted where the context or preparatory work permitted the certain conclusion that there had been agreement of the parties diverging from those terms and thus not clearly expressed therein. It need not be decided in this case whether that principle should be affirmed, since the decision of the Court below was incorrect even when the reserve required, according to the earlier decision of the Federal Tribunal, in the interpretation of treaties is observed.

"Article 17 of the Hague Convention uses the concept of nationals not in contrast to that of the State as an organism superior to them, but clearly means to distinguish between persons linked to the State by virtue of citizenship (in the case of natural persons) or seat (in the case of legal persons) and persons who, having no such link with the contracting State, are alien to it. In this sense the State itself is a national in so far as it acts in a private law capacity and deals with other persons on an equal footing. There is no reason why the

Case No. 9 *Contd.* parties to the Hague Convention should have wished to make the exemption from *cautio judicatum solvi*, applicable without exception to natural and legal persons belonging to them, inapplicable to the States themselves. When a State initiates a civil action in a foreign State and thus subjects itself to the foreign jurisdiction in the same way as a private person, it must be able also to enjoy the advantages granted to a private person in the same situation. In so far as writers have concerned themselves with the question, they have assumed that the contracting States can themselves rely on Article 17 of the Hague Convention (Riezler, *Internationales Zivilprozessrecht*, p. 440; Schnitzer, *Handbuch des I.P.R.*, vol. II, p. 731). The respondent invokes a French decision cited by Schnitzer; but that decision does not help him. The decision of the Tribunal Civil de la Seine of December 27, 1933 (*Revue critique de Droit international*, 1934, p. 901) refers, like an earlier decision of the Tribunal de Commerce of Marseilles of January 11, 1921 (*Revue de Droit international privé*, 1922–3, p. 305), not to Article 17 of the Hague Convention but to Article 166 of the Code of Civil Procedure (and Article 10 of the Civil Code). It lays down that a foreign State which initiates a civil action in France thereby renounces its sovereign rights and becomes, like a foreign private person, liable to the payment of *cautio judicatum solvi* in conformity with Article 166 of the Code of Civil Procedure. In so far as any conclusion can be drawn therefrom for the present case, it is that a State which brings a civil action in a foreign State must be treated like a private person, and thus can claim the advantages granted to private persons by treaty."

[Report: *Arrêts du Tribunal Fédéral Suisse*, 77 (1951), pp. 42–50.]

Case No. 10 **States — Sovereignty and Independence — Dignity — Foreign Sovereigns—The Law of Peru.**

In re RIVERA CALMET.

Peru, Supreme Court. August 23, 1951.

THE FACTS.—Leonidas Rivera Calmet, Representative to Congress for the Province of Lima and publisher of the weekly, *Buen Humor*, was charged with publishing an article offensive to the President of Argentina and Sra Eva Duarte de Perón and thereby endangering the amicable relations of Peru with a foreign Government, an offence recognized in the Penal Code. While Rivera admitted fault in permitting publication of the article, and apologies were exchanged, he was tried, and sentenced to four months' imprisonment and the payment of fines. On appeal, *Held:* that the judgment under appeal must be affirmed. The Supreme Court, in sustaining the judgment under appeal, found that while there was a difference between Article 298 of the Penal Code, which concerns attempts to bring about a change in foreign relations by violence, and Article 299, which concerns hostile acts that may endanger foreign relations, " the concept of ' danger ' (*peligro*) involves at the same time the concept of ' risk ' (*riesgo*) or potential danger, which is not necessarily limited to a material act of aggression but may comprehend peril arising through the medium of the press or publications ".

[Report : *Anales judiciales de la Corte Suprema de la República*, 47 (1951), p. 153.]

States—Sovereignty and Independence—Contract between Government and a Private Party—Interpretation of—Whether Presumption in Favour of Government.

See Case No. 171 (*Girdler Corp.* v. *Charles E. Johnson & Co.*).

iii.—Conduct of Foreign Relations. Conclusiveness of Statements of the Executive

Certificate of Ministry for Foreign Affairs—Determination of Extent of Territorial Jurisdiction of State.

See Case No. 39 (*Attorney-General of Israel* v. *El-Turani*).

IV.—Recognition of Acts of Foreign States and Governments

[See also below, D, *Recognition of States, Governments, Belligerency*; and Part IV, JURISDICTION: I, *Territorial*.]

Case No. 11 **Recognition of Acts of Foreign Governments—Exterritorial Effect of Confiscatory Decrees—Whether Sale by Trustee can be Confiscatory—Whether Valid to Transfer Property Outside Territory—Whether Enforceable in English Courts—Trading with the Enemy—Trading with the Enemy Act, 1939—Inchoate Agreement for Sale Made Before Act and Retroactively Validated After Act—Whether Within the Mischief of the Act—Enemy Character of Copyright Owner—Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939—Effect of Shedding Enemy Character—Position of Copyright Owner Who is No Longer an Enemy.**

NOVELLO & CO., LD. *v.* HINRICHSEN EDITION LD. AND ANOTHER.

England, High Court of Justice (Chancery Division).

(Wynn-Parry J.)

February 21, 1950.

Court of Appeal.

(Evershed M.R., Jenkins and Birkett L.JJ.)

June 29, 1951.

THE FACTS.—The plaintiffs were suing the defendants for infringement of copyright in two musical works. They sued as holders of two licences, dated February 19, 1940, and June 1, 1948, granted to them by the Comptroller of Patents, Designs and Trade Marks under s. 2 of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. The defendants admitted the acts complained of but denied any infringement. They said the copyright in these works in the United Kingdom was vested in the defendant Max Hinrichsen, as administrator of the will of his father Henri Hinrichsen, and that the acts of the defendant Hinrichsen Ld. were authorized by the defendant Max Hinrichsen, now a British subject.

The music publishing firm of C. F. Peters, Leipzig, was established early in the nineteenth century and came into the ownership of the Hinrichsen family in the latter half of the century. In 1901, Henri Hinrichsen became sole owner. In 1933 he took his eldest son, the defendant Max Hinrichsen, into partnership. In 1937, Max left the partnership and emigrated to England, whereupon Henri took his son Hans into partnership.

By an agreement of September 1, 1937, the firm of C. F. Peters appointed the plaintiffs as their agents for the sale of

C. F. Peters publications in the United Kingdom and certain other territory. This agreement contained no assignment of the English copyright in any of C. F. Peters publications.

The Hinrichsens were Jews. Under a decree of December 3, 1938, the Nazi Government of Germany, pursuant to its policy of persecuting the Jews, took steps to dispossess the defendants of their business. The two Hinrichsens, one of whom was already in a concentration camp, were forbidden by the German Government to carry on their business, which was sold by an agreement of July 22, 1939, to two other Germans by a trustee acting on behalf of the Government. The validity of the contract of sale was dependent on the consent of two German Ministries and this consent was not given until September 25, 1939, *i.e.*, after the outbreak of war. The two Hinrichsens were not parties to the contract of sale but they were compelled under duress to sign a document in July 1939, wherein they assented to the sale. The purchase price of RM.1 million was a gross undervaluation of the business, the previous year's balance sheet having been altered to make it seem more plausible. Even so, most of it was recoverable by the State in the form of taxes and dues levied on emigration. In 1942 Henri Hinrichsen died, being already predeceased by Hans and by the executor named in his will. In 1949, Max was granted, out of the Principal Probate Registry in England, letters of administration, with the will annexed, of his father's estate.

In 1940, and again in 1948, the plaintiffs, Novello & Co. Ld., had in England obtained from the Comptroller-General of Patents, Designs and Trade Marks, by virtue of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, licences in respect of the copyright in certain works published by C. F. Peters. The purpose of this Act was to provide that patents, copyrights, and the like, could be used where public interest required, even though the person who normally had the right to use them was prevented by Trading with the Enemy legislation.

The plaintiffs contended that the interests in the United Kingdom of the firm of C. F. Peters had passed under the sale agreement of July 22, 1939, and that the accession agreement signed by Henri Hinrichsen and his son was effective as a ratification of the sale; and that although the sale agreement had not been ratified on September 5, 1939, when the Trading with the Enemy Act, 1939, became law, the sale was not at that time still executory, and the Act did not, therefore, prevent an effective transfer of the English copyright. Further, they contended that a licence could be granted under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, provided only that the owner of the copyright had been an enemy at any time between September 3, 1939, and the date of application for a licence. It was also contended that once the jurisdiction of the Comptroller to grant licences under sub-s. 1 of s. 2 of the Act had arisen, no one could exercise the copyright without the licence of the Comptroller so long as the Act remained in force.

Held: (by Wynn-Parry J.) : that (i) the sale agreement of 1939 was ineffective to pass any interest in any English copyright owned by the two Hinrichsens and, therefore, the action must be dismissed. This was so because the Decree of December 3, 1938, on which the sale was based, was confiscatory in character and therefore not enforceable in English courts, and this doctrine applied with equal force to a sale by a so-called trustee appointed under the Decree. (ii) The sale agreement was not effective to pass property until it was confirmed on September 25, 1939, with the result that it was caught by s. 4 (1) of the Trading with the Enemy Act. (iii) A licence could only be granted under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, where the owner by the copyright was an enemy at the date of application. The owners in this case having shed their enemy character by 1948, the licence dated June 1, 1948, was *ultra vires* the Comptroller and invalid. In any case there was nothing in the Act to prevent an owner who had shed his enemy character from exercising his copyright.

Wynn-Parry J., after stating the facts, continued : " Upon that review of the facts I come unhesitatingly to the conclusion that the sale agreement was ineffective to pass any interest in any English copyright owned by Henri Hinrichsen and Hans Hinrichsen as the owners of the business of C. F. Peters.

" This case appears to me to be covered by the decision of Romer J., in *Frankfurther* v. *Exner* (*W.L.*) *Ld.*, L.R. [1947] Ch. 629, and indeed to be an *a fortiori* case."

His Lordship then cited the facts and part of the judgment in that case, and continued : " In my view every word of that reasoning applies in this case. The decree of December 3, 1938, was plainly of a penal and confiscatory character. Noatzke [the trustee] was appointed for the avowed object of giving effect to its confiscatory purpose, and the sale agreement represents no more than the discharge by him of that function. The decree, the appointment of Noatzke and the sale are indissolubly linked together, and the resulting position is no different than it would have been if the decree itself had directly effected the transfer of the business of C. F. Peters from Henri Hinrichsen and Hans Hinrichsen to Dr. Hermann and Dr. Petschull on the terms of the sale agreement.

" Henri Hinrichsen and Hans Hinrichsen were deprived of their property by confiscatory measures. It is established by the authorities (many of which were reviewed by Romer J., in his judgment in the above case, and which I do not intend to review again) that the courts of this country will not give effect, so far as regards assets situate within their jurisdiction, to the law of a foreign country which is confiscatory in policy. Romer J. in *Frankfurther* v. *Exner* (*W.L.*) *Ld.* [1947] Ch. 629 has held that this doctrine extends to an act such as the appointment of a so-called trustee pursuant to such a decree, the effect of which is to take out of the control of the owner the management of his business. In my view I am not extending this doctrine by applying it to a sale by a trustee so appointed ; but if indeed I am extending it, I do so without hesitation, finding as I do that the law is confiscatory in nature, the trustee was appointed to carry it out, and the sale agreement represented no more than the performance of his function. It follows, therefore, that assuming the sale agreement is otherwise valid under English and German law, it was ineffective in the eye of English law to effect any transfer of the English copyright owned by Henri Hinrichsen and Hans Hinrichsen as owners of the business of C. F. Peters.

" It was argued by Mr. Shelley [for the plaintiffs] that the present case is distinguishable from that of *Frankfurther* v. *Exner* (*W.L.*) *Ld.* because of the presence of the sale agreement. The burden of Mr. Shelley's argument, as I understand it, was that the ratio decidendi of the cases on which Romer J. founded his conclusion does not apply when the act said to amount to confiscation is the result of a consensual document and not the direct result of legislation. I cannot accept this argument. It involves concentrating on the form of the matter and shutting one's eyes to any inquiry as to the substance. For the reasons which I have given, I regard the deprivation of Henri Hinrichsen and Hans Hinrichsen of their property at a gross undervaluation as the inevitable consequence of the decree. It was somewhat curious to listen to the attempt on behalf of the plaintiffs to justify the sale in face of the view expressed by one of their directors, a Dr. Aber, both at the time and in the witness-box that it was robbery, a view with which I find myself in entire agreement.

" Mr. Shelley then sought comfort in another contention, to appreciate which it is necessary to refer to a further agreement which has been described as the accession agreement. That is a document dated July 22, 1939, the same day as the sale agreement. The parties are Doctors Hermann and Petschull on the one hand and Henri Hinrichsen and Hans Hinrichsen on the other. It recites that Doctors Hermann and Petschull have concluded the sale agreement with ' the trustee appointed in accordance with para. 2 of the regulation concerning the utilization of Jewish property dated December 3, 1938 '. By cl. 1 Henri Hinrichsen and Hans Hinrichsen were expressed to accede to the contract of sale in its entirety. The agreement contains a number of other provisions to which for my present purpose I need not refer.

Case No. 11 *Contd.*

" It is perfectly true that Henri Hinrichsen and Hans Hinrichsen signed this agreement. But it is essential to have in mind the circumstances in which they did so. Their signatures to this agreement were required as a formality—see a memorandum of Dr. Franz dated December 30, 1938—and in my view they were required for no other purpose. They were, however, compelled to go to Berlin to sign. They took no part in the execution of the sale agreement and were not present when it was signed, being kept in an adjoining room. After the sale agreement was signed the accession agreement was put before them in the presence of the notary and other parties. Dr. Petschull told me that Henri Hinrichsen and Hans Hinrichsen looked shocked. It is clear that they were not willing parties. The whole ceremony lasted only a few minutes and was nothing but a tragic farce.

" Mr. Shelley, as I understand his argument, prays in aid this accession agreement to contending that in effect it incorporates into it the whole of the terms of the sale agreement which it purports to ratify ; that therefore the validity of the sale purported to be effected by the sale agreement must depend on the validity of the accession agreement ; that the accession agreement was at the worst a voidable contract as having been executed by Henri Hinrichsen and Hans Hinrichsen while under duress, but that it was, therefore, capable of ratification after the duress had ceased to operate ; that ratification in fact took place, and therefore the sale was effective.

" I do not accept this argument. In my view neither the character nor the operation and effect of the sale agreement can be changed by anything appearing in the accession agreement. The element of duress may affect the validity or enforceability of an agreement but it can never affect its scope. The scope of the sale agreement was determined once and for all at the moment of its execution. For the reasons which I have given, the sale agreement (so far as the courts of this country are concerned) did not extend to transfer any interest in the English copyright.

" The courts of this country are bound not to recognize the extra-territorial effect of the sale agreement on that copyright because of the confiscatory nature of the measures in question. This is the application of a rule of public policy which involves a limitation of jurisdiction. No question of affirmation or ratification can therefore arise so far as the sale agreement is concerned. But unless the accession agreement can operate to affect the scope of the sale agreement (and I hold that it cannot), it is immaterial to consider whether or not the accession agreement was voidable on the ground that it was entered into by Henri Hinrichsen and Hans Hinrichsen under duress and, assuming that it was, whether or not it was subsequently affirmed. In my judgment either the accession agreement is linked with the sale agreement and suffers from the same vice as that document, or, if it is not to be regarded as so linked with it, it is just a worthless piece of paper.

" The next point which I propose to consider is a point taken by the defendants under the Trading with the Enemy Act, 1939. For the purpose of appreciating this point it is necessary to turn again to the sale agreement, to postulate that it was a valid document according to German law at the time of its execution, that it was not limited in scope as I have held it to be, and therefore, apart from the point under examination, that it was effective to transfer the English copyright. On this basis the defendants contend that the operation of the Trading with the Enemy Act, 1939, was to prevent any effective transfer of the English copyright."

His Lordship then considered the expert evidence on the effect in German law of the sale agreement. He concluded that the sale agreement was inchoate until the required consent of the Ministries was given ; but that once that consent was given the agreement became valid retroactively to the date of the agreement. His Lordship continued :

" The Trading with the Enemy Act, 1939, received the Royal Assent on September 5, 1939, but the final consent to the sale agreement—that of the Ministry of Economics—was not given until September 25, 1939, by a letter significantly headed : ' Re de-Jewing of the Music Publishing House of C. F. Peters, Leipzig '. By s. 4, sub-s. 1, of the Trading with the Enemy Act, 1939, it is provided : ' No assignment of a chose in action made by or on behalf of an enemy shall, except with the sanction of the Treasury, be effective so as to confer on any person any rights or remedies in respect of the chose in action . . . '. It is true that the effect of the Ministry's consent was to make the contract effective as from its date ; but as I have pointed out, until that consent was given, the contract was wholly ineffective to pass any property. It only became choate on September 25, 1939, and only then did it operate on property. It was, therefore, a contract by which a chose in action was effectively assigned by an enemy only after the coming into force of the Trading with the Enemy Act, 1939. The assignment is therefore within the mischief of the Act, and is not cured by being given retroactive effect under German law. For this reason also the sale agreement must be treated as having been ineffective to transfer any English copyright owned by Henri Hinrichsen and Hans Hinrichsen as owners of the firm C. F. Peters.

" It is then said, however, that even if the scope of the sale agreement is limited, as I hold it to be, or alternatively even if the scope of the agreement is not so limited, but the point taken under the Trading with the Enemy Act, 1939, is good, nevertheless the defendants cannot succeed in their defence because of the operation of the Patents, Designs, Copyright and Trade

Case No. 11 *Contd.* Marks (Emergency) Act, 1939. I say at once that I am unable to accept (indeed I found myself hardly able to follow) the argument which was addressed to me on this point. The Act is one which was passed in an emergency for the public benefit during that emergency, and from its nature it is one which should not be given a wider interpretation than is necessary to achieve the main purpose for which it was enacted."

His Lordship then examined the relevant provisions of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. He concluded that the second licence granted by the Comptroller-General to the plaintiffs was *ultra vires* as the owner of the copyright had at that time shed his enemy status ; moreover, neither licence was an exclusive licence and therefore would not in any case have the effect of preventing a copyright owner who had shed his enemy status from exercising his own copyright.

" In this case the licences in question were non-exclusive. Under sub-s. 4 of the section their limited effect is to take away from the owner of the copyright 'any right in relation thereto the exercise whereof would be inconsistent with the exercise of the licence in accordance with and subject to the terms on which it is granted'. While this sub-section is designed to protect the statutory licensee, its clear implication is that the residual rights of the owner of the copyright are preserved.

" For the reasons which I have given, the defendant Max Hinrichsen is properly to be regarded as the owner of the copyright in the two works in question. As such he is entitled to permit the exercise of that copyright by the defendant company, provided that the statutory licences of the plaintiffs are not prejudiced so long as they continue to exist."

The defendants appealed, confining their appeal to the question of the construction of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. They argued (i) that Max Hinrichsen, as owner of the copyright, could not grant a licence to Hinrichsen Edition Ltd. because, it was said, the Act of 1939 took away that right from owners of copyright to which the Act applied ; (ii) that the Comptroller-General had power to grant the licence in 1948 because the copyright had at some time since September 3, 1939, been enemy-owned.

Held (by the Court of Appeal) *:* that the decision of Wynn-Parry J. must be affirmed. Max Hinrichsen was entitled to grant the licence because owners of copyrights to which the 1939 Act applied were still free to exercise their rights unless and until some licence affecting them were granted by the Comptroller. Where, as in this case, the only licence granted was a non-exclusive one, there was nothing in the Act to prevent the owner, if not disqualified under the Trading with the Enemy Act, 1939, from himself exercising the copyright or granting non-exclusive licences in respect of it.

It was not necessary, therefore, to decide whether the Comptroller had power to grant the licence in 1948 or not, but it was said that the opinion of Wynn-Parry J. on this point was not necessarily well founded.

Lord Evershed M.R. said : " In 1940, when the first of the licences was granted, there is no doubt that the copyrights were enemy-owned within the meaning of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. On June 1, 1948, if the question had then been asked, a very natural answer would have been that they were probably still enemy-owned. But, on the granting of letters of administration to Max dating back to 1942, we can now say, on the basis of Wynn-Parry J.'s judgment (which nobody has contradicted), that on June 1, 1948, the copyrights must be taken to have been owned by Max, a British subject. Both licences were non-exclusive, and I use that phrase to mean that they did not grant the rights which they covered exclusively to the grantees ; and they were also for limited periods. The grant not being exclusive, prima facie it clearly follows that the exercise by the first defendants of the right to publish these works as a result of another licence, also non-exclusive, by Max, would be no infringement, if there were a right to grant such licences on the part of Max. That rests on the simple proposition that one non-exclusive licensee cannot complain that another non-exclusive licensee is infringing the first non-exclusive licensee's grant.

" There are therefore two questions under the statute : The first is whether Max, admittedly now the owner of the copyrights, can grant to anybody a non-exclusive licence, or whether, as Sir Andrew Clark has claimed, the effect of the Act is to take away altogether, and for the whole term of the copyright until such time as this Act is repealed, all the rights of the copyright owner to deal with his own copyright.

" The second question is whether, since the date when the second licence was granted (for reasons I have indicated the copyrights must be taken to have then been non-enemy owned), there was any jurisdiction in the comptroller to make the order he did ; and, if there was not, then the order is ineffective and produces no rights at all. The judge decided both those points in favour of the defendants. I take clearly the view on the first point that the making of the order and the Act did not, either of them, or together, take away the right of Max to grant a licence, subject only to the terms of s. 2, sub-s. 4, of the Act, and that there was therefore no infringement by either of the defendants of the non-exclusive licence granted by the comptroller.

" As I take that view, it is unnecessary to express a concluded opinion on the other question of construction, namely,

Case No. 11 *Contd.*

whether it is sufficient to vest in the comptroller the powers of the Act that at some time, however remote in the past, the copyrights have been owned by an enemy or an enemy subject. Taking the view that I do, I need not spend much time on the point, but I ought to make it clear how the point arises.

" It emerges from the opening words of s. 2, sub-s. 1 (*a*), which states the conditions on which the powers of the comptroller to make orders arise. The words are : ' Where an enemy or an enemy subject is, or has at any time since the beginning of September 3, 1939, been, whether alone or jointly with any other person, . . . the owner of a copyright ', etc. The judge took the view that, on the true construction of those words, it was necessary, that at the time when the application was made to the comptroller for an order, either the owner must then still be an enemy, or (I think he also so put it), the owner having been an enemy who had parted with the copyright to a non-enemy, that original enemy owner was still alive and was still an enemy.

" On the other hand, it is said that, according to the ordinary meaning of the words used, the condition is satisfied if at any time since September 3, 1939, and for however short a time, the copyright has been owned by an enemy or enemy subject ; and that then the jurisdiction arises whatever has since happened either to the original enemy-owner, or the former enemy-owner, or anybody else, and whether or not at the time of the application the owner is or is not an enemy.

" The second view (that for which Sir Andrew Clark contended) does seem startling. This Act, unlike many others passed about the same time, which have recently been considered in another court, is not limited in its duration by reference to ' the emergency '. True it is an Act which was passed, as the long title states, ' to meet any emergency which may arise ', but it is an Act which has no automatic termination and no means whereby it could be terminated otherwise than by repeal ; and it will therefore remain on the statute book until repealed. And it is to be noted that, just as the Trading with the Enemy Act, 1914, remained unrepealed for twenty-five years until it was replaced by the Trading with the Enemy Act, 1939, so it may be that this Act will remain on the statute book for a long time. As one looks ahead into the future, it does indeed seem startling that this right in the comptroller to grant licences will persist for years and years simply because for some time, however short, the copyright owner or his predecessor in title had been in, say, occupied France. There is, therefore, a strong ground, at any rate, for supposing that such a construction goes beyond the purpose of the Act. On the other hand, the language of the section, according to the ordinary sense of it, seems to imply the meaning given to it by Sir Andrew Clark, and sub-s. 5 of s. 2 seems clearly to contemplate that at the date of the grant of the licence the copyright owner would not be an enemy.

"It is right to say that this point was not raised, except formally on the pleadings. It was not a point which the defendants had actually taken in argument. It was raised by the judge and debated between him and Mr. Shelley (who then appeared for the plaintiffs) in the course of Mr. Shelley's final speech; and, perhaps because it so arose, the attention of the judge was not directed to *In re I.G. Farbenindustrie A/G. and Bayer Products Ld.'s Agreement* [1941] Ch. 147; 58 R.P.C. 31, relating to a letters patent in the name of Bayer Products Ld., in which, as Mr. Aldous pointed out, Morton J., in the course of his judgment 58 R.P.C. 38, 55, seems to have taken a view contrary to that which appealed to Wynn-Parry J., namely, the view contended for by Sir Andrew Clark.

"This point is no longer essential to the result. If we were to express a concluded opinion upon it adverse to the defendants, we should leave them in the difficult position that they could not appeal against it. On the other hand, I think, having regard to the argument and particularly to the view expressed by Morton J., it is right to say at least that I am not myself satisfied that the view taken by Wynn-Parry J. is well-founded. I say no more upon it, because I think that it should be left open, if and when this matter comes again before the courts, for the judge of first instance to take his own independent view and not to feel himself bound by Wynn-Parry J.'s view any more than by that of Morton J. It may well be that the actual significance of the point will not be great and will as time goes on recede altogether.

"I now turn to the other point. Sir Andrew Clark's argument has, I think, upon analysis, come to this: he fully accepts that if the result of this Act is wholly to suspend for the entire term of the copyright all the rights of the copyright owner should he or his predecessor in title have been an enemy within the meaning of the Act, for however short a time, he must show that the result follows, either expressly or by necessary implication, from the proper reading of the words. As a matter of general principle, such a taking away (for suspension is a taking away, in spite of the distinction Sir Andrew Clark sought to draw) of the rights of the owner must be clearly expressed in the Act, and however beneficent the comptroller may be, and, indeed, though he may be infallible in his administrations, an owner of copyright would, I think, not feel those considerations to be an entirely satisfactory compensation for the deprivation of his own right to deal with his own property.

"Sir Andrew Clark starts by saying that the purpose of this Act was to sterilize copyrights of the character named. I will not refer to patents and designs, for this case is concerned only with copyrights. Sir Andrew Clark suggests that the object is to

Case No. 11 *Contd.*

sterilize the copyrights and to put them into the beneficent hands of the comptroller, so that (as I understand him) for this long period of time the profits of the copyright should always be available for the Custodian of Enemy Property for purposes connected with or arising out of the war. I do not accept that first premise. I think that, so far from the purpose of the Act being to sterilize the rights of the parties, it was to prevent their sterilization ; and that what the Act was designed to do (again I confine myself to copyrights, though the force of this may be even stronger with regard to patents) was to put into the comptroller's hands a power to see that these copyrights could be used in the public interest, although the person who alone could give the right to use them was prevented from doing so by his enemy status. I therefore approach this Act with that in mind. Although it is an Act which is not temporary in the same sense as some of the Acts passed at about this time were temporary, it is an Act which, according to its long title, was designed to meet emergencies arising out of the war ; and we should therefore not give it a construction, unless forced so to do, which would appear to extend its operation far beyond the mischief which, according to its own expression, it was designed to remedy.

" I think that Sir Andrew Clark fairly admitted that his case really rested on this (for he could find no words which in terms suspended all the rights of the owner), that, since the comptroller was given the right, by order, to grant exclusive licences, therefore he must exclusively have the right to grant any licences. Verbally that proposition sounds attractive, but logically it is, I think, unsound. It is to be borne in mind that an exclusive licence by no means comprehends only a licence covering the whole of the rights of the copyright for the whole of the term of the copyright, though the right to grant an exclusive licence would, no doubt, comprehend that particular transaction, however unlikely in practice it may be. The proposition itself is, I think, unsound, and when you look at sub-ss. 2, 3 and 4, and also indeed, at the other sections and sub-sections to which we have been referred, all the indications are the other way.

" As we are concerned with musical copyright, it is perhaps, not inappropriate to say that reading sub-ss. 2, 3 and 4 the indications appear in a crescendo. In sub-s. 2 (*b*) power is given to make an order ' notwithstanding that a licence, whether exclusive or otherwise (not being an exclusive licence granted by virtue of the powers conferred by this section) is in force in relation thereto '. That is at least consistent with the view, contrary to that which Sir Andrew Clark has advanced, namely, that licences are contemplated after the impact of the Act, being licences granted by the owner, as well, indeed, as by the comptroller himself, the exception being only of exclusive licences granted by the comptroller. The matter is more forcible when one comes to sub-s. 3, which provides that, where the comptroller makes an order granting a licence in relation to a copyright in relation to which any other licence has been granted otherwise than by an order, then he is given the power to vary those other licences, a power similar to the power conferred on him by sub-s. 1, but limited in that case to ' pre-taint ' licences, as they have been called, namely, licences granted before the impact of the Act. Sub-section 3 is not entirely conclusive, because it may be that there is substance in the distinction which Sir Andrew Clark drew between the circumstances in which the comptroller could make a variation under s. 1 and those in which he could make one under s. 2—though I think that at this stage counsel has reached very thin ice. But when we come to sub-s. 4 of s. 2 and read what I have ventured in anticipation to call the forte, I think the ice gives way under Sir Andrew Clark altogether. Sub-section 4 states that ' an order granting a licence under this section shall, without prejudice to any other method of enforcement, operate as if it were embodied in a deed granting the licence which . . . the owner of the copyright . . . had executed with full capacity so to do, and the order shall accordingly operate to take away from any such party any right in relation thereto the exercise whereof would be inconsistent with the exercise of the licence in accordance with and subject to the terms on which it is granted '.

" Sir Andrew Clark has sought to escape from that very formidable difficulty by saying that the sub-section is purely procedural ; that it is intended to give a right of action to the compulsory licensee against the copyright owner ; and that, although it says ' the order shall take away the owner's rights so far as is necessary ', that is in no way in conflict with the proposition that the Act has already suspended all the rights. He draws a distinction between ' taking away the rights ' and their total suspension by saying that, although a man's rights are totally suspended, he has only to go to the comptroller and obtain his licence and then he can himself exercise them. That argument wholly fails to satisfy me. I think that sub-s. 4, and the final words which I have emphasized, make it plain that what the licence granted under the order does is what this sub-section says it does, that is, *pro tanto* to take away the rights of the owner as though he had made a grant in the terms of the order. I think that were it otherwise it would be a little shocking. The suggestion that the existence of this control would have the effect, on the whole term of the copyright, of taking from the owner's hands altogether all his rights of dealing with his own property is one which no court could accept unless the words used were absolutely compelling. I certainly have failed to find any such compulsion in this sub-section.

" I need not travel through the other parts of the Act which

Case No. 11 *Contd.*

have been mentioned. Suffice it to say that there is nothing anywhere which I can find capable of being the smallest comfort to Sir Andrew Clark's argument. It was suggested by him and Mr. Aldous, with apparent equanimity, that this Act contemplates that perhaps half a century hence an owner could come with his hat in his hand and obtain from the comptroller, out of the goodness of his heart, the right to operate his own copyright ; and then it was suggested that that privilege which the copyright owner might, if he were lucky, obtain would be qualified by this, that he would have to pay royalties to the Custodian of Enemy Property in respect of the exercise of the rights relating to his own copyright. I am not surprised that Wynn-Parry J. rejected this argument with some vigour, and I hope I shall in no measure be lacking in vigour in refuting it likewise. I think it is a bad argument, and I reject it. I think that the appeal ought to be dismissed."

Jenkins L.J., after examining the relevant sections of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, said : " Taking all these indications together, it seems to me that, not only can it not be said that the powers conferred on the comptroller by the Copyright Act, 1939, are such that the Act itself by necessary implication ousts all the rights of the actual owner of a copyright, but there are, on the contrary, strong indications the other way. In my judgment, on the true construction of the Copyright Act, 1939, its effect is that, subject to the restrictions imposed by the Trading with the Enemy Act, 1939, owners of copyrights to which the Copyright Act, 1939, applies are still free to exercise their rights, unless and until some licence, when granted, ousts any exercise of the owners' rights, which would be inconsistent with the terms of that licence, and to a like extent, overrides any licence previously granted by the owner. But unless and until the comptroller has moved in the matter and has granted a licence, in my judgment, the owners' rights remain as they were. When a licence has been granted, its terms must be looked at to see how far the owners' rights are restricted. Where, as in the present case, a mere non-exclusive licence has been granted, then there is nothing in the Act to prevent the owner, if not disqualified by some provision of the Trading with the Enemy Act, 1939, from himself exercising the copyright or granting non-exclusive licences in respect of it. Accordingly, I agree that the appeal fails and should be dismissed."

[Report : L.R. [1951] Ch. 595, 1026.]

Recognition of Acts of Foreign States and Governments—Extra-Territorial Effect of—Confiscatory and Revenue Laws—Disguised Confiscatory Measures—The Law of Sweden. **Case No. 12**

KOZICKI *v.* BALTYCKA SPOLKA RYBNA *ET AL.*

Sweden, Supreme Court. December 3, 1951.

THE FACTS.—On December 20, 1948, two Polish citizens, Zdrojewski and Kozicki, fled from Poland in two trawlers which belonged to a Polish fishing company (Baltycka Spolka Rybna). Upon their arrival in Sweden, Zdrojewski, sole owner of the company, sold the cutters to Kozicki. Another State-owned Polish company which had sold the cutters to the fishing company sought, in an action brought against the fishing company before the City Court of Stockholm, payment of the balance of the purchase price. The claim was admitted and an award made. In execution of the award the boats were seized. Thereupon Kozicki instituted proceedings against the companies asking for a declaration that he was the owner of the property. He relied, in the first place, on a written agreement signed by Zdrojewski for the fishing company on December 30, 1948, and contended, further, that in any case the Polish authorities by imposing arbitrary taxes on the fishing company, by appointing a custodian for the company and by ordering its liquidation, all with the aim of transferring the company's property to the Polish State, had in fact confiscated the cutters. The companies opposed the action. They contested the validity of the agreement on the ground that Zdrojewski by leaving Poland with no intention to return had, according to Polish law, lost his right to represent the fishing company. They further denied the confiscatory character of the measures referred to by Kozicki. At first instance it was held that Kozicki had a valid title to the property. The contract by which Zdrojewski sold the trawlers to Kozicki was, it is true, not binding on the fishing company, for—according to Polish law, which was to be applied in the matter—Zdrojewski was not competent to represent the company. However, after Zdrojewski's and Kozicki's escape, the Polish authorities had transferred the property of the fishing company to the Polish State by means of confiscatory measures. The confiscation could not have legal effects as regards the trawlers which were in Sweden. These belonged to the private parties which had lost their rights by the confiscation of the company's property. Zdrojewski was the sole owner of the company at the time of his escape and consequently entitled to dispose of the trawlers in Sweden. He had lawfully ceded them to Kozicki, who, therefore, had a valid title to them.

After an unsuccessful appeal to the Court of Appeal, and on further appeal,

Case No. 12 *Contd.*

Held (by the Supreme Court): that the judgments of the Courts below must be reversed. A declaration of title could not be granted to Kozicki. The contract which Zdrojewski and Kozicki concluded in Sweden could not bind the fishing company, unless the contrary would follow from the Swedish law concerning the effects of foreign confiscatory legislation. In respect to this last question the measures taken in Poland in order to appoint a custodian for the company and to wind up the company were taken in conformity with ordinary Polish private law. This legislation in itself was not of such a character as to be denied effect with regard to property in Sweden. Nor could the taxes imposed already with regard to the character of the revenue law be considered as confiscatory. Furthermore, such circumstances had not been shown that the Polish legislation in the present case could be assumed to have aimed at depriving the fishing company of its property and to confiscate it. In this respect it was to be noted that the company had considerable debts in addition to unpaid taxes and that the taxes imposed upon the company as far as appeared from the evidence were the same as those generally levied on this type of company. The measures taken therefore could not be denied validity in Sweden. No other circumstance had been indicated on the basis of which Zdrojewski could have been entitled to dispose of the property.

[Report: *Nytt Juridiskt Arkiv*, 1951, p. 753.]

Case No. 13

Recognition of Legislation of Foreign States—Nationalization of Business Enterprise—Extra-Territorial Validity of—Effect on Liability of Guarantor to Answer for Debts of Nationalized Enterprise.

In re HYDRIERWERKE A.G.

German Federal Republic, District Court of West Berlin.
December 1, 1950.

THE FACTS.—The plaintiff was the owner of certain shares in a company whose registered offices and factory were situate in that part of Germany which was subsequently incorporated by Poland. The defendants had undertaken to guarantee the capital represented by and the interest accruing on these shares. The company was nationalized by a Polish Decree of January 30, 1946, and the plaintiff now brought an action against the defendants for a declaration that the defendants were liable, as sureties, to satisfy his claim for the capital and interest represented by his shareholding. It was contended on his behalf that the Polish Decree was limited to Poland in its territorial effect and therefore incapable of extinguishing the legal personality of the company in Germany, and that accordingly the defendants were liable to answer for its debts. On behalf of the defendants, it was contended that as the debtor had ceased to exist by virtue of the Polish Decree of nationalization, the guarantee was not enforceable, on the ground that the liability of a guarantor presupposes the existence of a debtor.

Held: that the plaintiff must succeed. The nationalization of the company in Poland had no extra-territorial effect and was therefore incapable of extinguishing the legal personality of the company in Germany, and that as there was still a debtor in existence the plaintiff was entitled to a declaration that the defendants were liable under the guarantee. The Court said:

" It is generally recognised that, even if the Polish State were to be regarded as having the right to carry it out in the Eastern German territories entrusted to it, the expropriation can have no effect on assets situate in foreign territory outside the limits of the expropriating State. Even if no such assets were present in the territory of the German State, *viz.*, if the expropriation by the Polish State had resulted in the debtor's being deprived of all his assets, this fact would not have caused the extinction of the legal personality of the debtor, the Hydrierwerke AG, because the fact that a company is devoid of assets does not *ipso facto* cause its extinction. . . ."

[Report: *NJW*, 4 (1951), p. 238.]

Recognition of Acts of Foreign States—New State—Divorce Decree of Courts of—Lack of Competence to Review—Proceedings Begun before Acquisition of Sovereignty. **Case No. 14**

G. *v.* G.

Holland, District Court of Rotterdam. January 22, 1951.

The Facts.—Some time before the transfer of sovereignty from the Netherlands to the Republic of the United States of Indonesia on December 27, 1949, W.G. instituted proceedings before the Landrechter at Bandung (Java) for divorce on the ground of his wife's adultery. Both husband and wife were of Netherlands nationality and domiciled in the Netherlands, but the husband was temporarily resident in the then Netherlands Indies. The decree of divorce was duly pronounced by the Landrechter by a judgment given on January 20, 1950, *i.e.* after the transfer of sovereignty, and confirmed by an Indonesian Court of Appeal on April 22, 1950. The former wife now applied to the District Court of Rotterdam for the divorce to be set aside on a number of grounds which went both to procedure and to the merits of the case.

Case No. 14 *Contd.*

Held: that the application must fail. The legal issues must be decided on the footing that, although an important part of the proceedings had taken place in the period before the transfer of sovereignty, the judgments were judgments of a foreign Court, into the merits of which a Netherlands court was not competent to enter.

[Report: *N.J.*, 1952, No. 121.]

States—Recognition of Foreign Legislation—Foreign Confiscatory Legislation—Effect of—Fate of Debts Incurred Prior to Confiscation.

See Case No. 46 (" *Der Güternahverkehr* " v. *Seidl*).

Recognition of Foreign Legislation—Foreign Confiscatory Legislation—Effect of—Company Confiscated Abroad but Owning Property in Country of Forum—Claim by Former Employee of Company—Whether Company Subject to Jurisdiction of Forum.

See Case No. 45 (*Re Erste Znaimer Brauerei und Malzfabrik AG*).

V.—Continuity of States

[See also below, E, *State Succession.*]

Case No. 15

States—Continuity of—Collapse of German Reich—Assets of Former Reich—Whether Vested in Federal Republic of Germany—Claim of Former Reich Asserted by Federal Republic—Whether Defendants Entitled to Claim Set-Off in respect of Debt Owed by Reich.

COLLISION IN THE BALTIC CASE.

German Federal Republic, Federal Supreme Court.
October 30, 1951.

THE FACTS.—On September 21, 1944, a collision occurred in the Baltic between a German warship and a merchant vessel owned by the defendants, as a result of which the warship was damaged. It was subsequently adjudged—and not disputed in the present proceedings—that the captain of the defendants' vessel was responsible for the collision. Some time prior to the collision, however, the defendants had acquired an undisputed claim against the German Admiralty for certain charter fees which exceeded in amount the sum due to the Reich in respect of the collision. In the present action, which was instituted by the Federal Republic of Germany, the latter claimed damages resulting from the collision, and the defendants sought to set off the amount owing to them by way of charter fees. On behalf of the Federal Republic it was contended that as the Federal Republic was not identical with the former Reich, there was no such reciprocity between the respective claims of the parties as would entitle the defendants to claim a set-off, and that in any event the Federal Republic was entitled to refuse the payment of debts incurred by the former Reich, on the ground that the financial structure of the Reich had collapsed and that no legal provision had yet been made for the discharge of its liabilities. On behalf of the defendants it was contended that the assets of the former Reich situate within the territory of what was now the Federal Republic of Germany were vested in the latter, and that the Federal Republic was therefore liable to discharge the debts of the former Reich in so far as they related to that territory, and that accordingly the defendants were entitled to set off their claim against the former Reich in the present proceedings.

Held: (i) that the Federal Republic of Germany was not entitled to claim a general right to refuse to discharge the debts of the former Reich; (ii) that there was such reciprocity between the respective claims as entitled the defendants to set off their claim against that of the Federal Republic, and that as the former exceeded the latter, the action of the Federal Republic must be dismissed. The Court said:

" The jurisprudence of the courts is to the effect that the German Reich is to be regarded as a legal entity even after the establishment of the Federal Republic. This, however, does not preclude the vesting of a part of the assets of the German Reich in the Federal Republic upon the coming into force of the Basic Law (Constitution of the Federal Republic). In the present case only one question is relevant: Which legal entity is entitled to claim the debt situate in the British zone of occupation which was vested in the former Admiralty of the Reich? The question as to whether the property of the Reich has become vested in the Federal Republic has often been answered in the negative, in application of Article 134 of the Constitution, the argument being that in the absence of the enactment referred to in Article 134 (4) of the Constitution,[1] a transfer of property has not yet taken place. This view, however, does not stand close legal scrutiny. . . . If Article 134 (2) of the Constitution enjoins the Federal Republic to 'transfer' certain assets to the 'Länder', this wording indicates that the Federal Republic must already be the owner of such assets as otherwise it would not be in a position to transfer anything. Account must also be taken of the fact that Article 134 of the Constitution deals, above all, with the distribution of the assets of the Reich between the Federal

[1] Article 134 (4) provides that all details concerning the ultimate fate of the assets of the Reich, the "Länder" and the municipalities, shall be provided for by a law to be enacted by the Federal Republic.

Case No. 15 *Contd.*

Republic, the ' Länder ' and the municipalities. This consideration suggests that the words ' shall become ' in paragraph 1 [1] do not refer to the relationship between the German Reich and the Federal Republic, but to those processes by which the distribution of assets is effected as between the Federal Republic and the ' Länder '. . . . It follows that the Federal Republic is the owner of the assets of the Reich situate in the British zone of occupation and is therefore correctly described as the plaintiff in this action. . . .

" The Federal Republic would appear to contend that it is not the debtor of the counterclaim put forward by the defendants, and that accordingly there is no reciprocity between the respective claims. . . . This contention is unfounded where, on the basis of the doctrine of identity, which stresses the identity of the German Reich and the Federal Republic, there has been no change in the entities in whom the claims are vested. Furthermore, the Federal Republic contends that even if it were the true debtor of the counterclaim, the defendants would not be entitled to a set-off, on the ground that the Federal Republic has a general right to refuse the discharge of debts, which right would deprive the defendants of their right to claim a set-off. This contention is also unfounded. . . . It would be contrary to good faith if a creditor of the Reich who, before the capitulation, was entitled to claim a right of set-off, were to be deprived of that right by reason of the collapse of the Reich, while the latter would be in no way precluded from asserting its own claims against its debtors. For this reason the Federal Republic is not entitled to defeat the set-off of the defendants by an alleged general right to refuse the discharge of liabilities."

[Report : *JZ*, 7 (1952), p. 110.]

Case No. 16

States—Continuity of—Status of Saar Territory—Conviction for Criminal Offence before a Court of the Saar Territory—Whether such Court is a German Court or a Foreign Court within the Meaning of German Criminal Law.

RECIDIVIST (TRIBUNAL OF SAAR TERRITORY) CASE.

German Federal Republic, Court of Appeal of Frankfurt.
August 22, 1951.

THE FACTS.—Section 264 (1) of the German Penal Code provides that where a person has twice previously been convicted " in Germany " (" *im Inland* ") of the offence of obtaining money by false pretences, he shall be liable to punishment as a recidivist. The appellant had been previously convicted of an offence of this nature by a court exercising jurisdiction in Germany, and he was again so convicted on October 13, 1949, by a court exercising jurisdiction in the Territory of the Saar. On his being charged with two further such offences before a German court, the prosecution contended that he was liable to punishment as a recidivist, the second conviction, though obtained before a court of the Territory of the Saar, being in law a conviction obtained " in Germany ", as provided in section 264 (1) of the German Penal Code. On behalf of the appellant it was contended that the second conviction was not a conviction obtained " in Germany ", the Territory of the Saar no longer being German territory on the date of conviction.

---

[1] Article 134 (1) provides that " in principle the property of the Reich shall become the property of the Federal Republic ".

Held: that the Territory of the Saar still formed part of Germany and that the second conviction had therefore been obtained " in Germany ", with the result that the appellant must be punished as a recidivist. The Court said:

" The courts of the Saar Territory are German authorities, notwithstanding that some of the courts and government departments of the Saar are staffed by civil servants who are of French nationality. The Territory of the Saar still forms part of the territory of the Reich. The territorial limits of the German Reich are laid down in the Declaration of the Occupying Powers of June 6, 1945, and in accordance with this Declaration Germany is deemed to be the territory situate within the German frontiers as existing on December 31, 1937. The instructions issued on November 9, 1950, by the Federal Ministry of the Interior to the Ministries of the ' Länder ' therefore rightly point out that the Territory of the Saar is, both in international and in constitutional law, a part of Germany, and that the inhabitants thereof have remained German nationals vis-à-vis the Federal Republic, notwithstanding the law enacted by the Saar Parliament on July 15, 1948, concerning Saar nationality. So far there has been no determination which is recognised internationally and is effective in international law and which would modify the territorial limits of Germany as laid down in the Declaration of the Occupying Powers of June 6, 1945.

" In the present context it is immaterial whether the conviction has been obtained in a part of Germany which is subject to a unified administration of justice, such as that of the German Federal Republic. The temporary division of Germany into zones of occupation and economically independent territories does not affect the territorial extent of Germany. What is decisive is the fact that in all these territories there is a German administration of justice, and that justice is administered according to German law, as regards both substance and procedure, even though the law may not be the same everywhere. Judgments rendered by these courts remain the

Case No. 16 Contd. judgments of German courts, and convictions pronounced by them are therefore convictions resulting in recidivism within the meaning of sections 244 and 264 of the Penal Code."

[Report: *NJW*, 4 (1951), p. 932.]

Case No. 17

States—Continuity of—Changes in Condition—Whether Federal Republic of Germany Identical with Former Reich—Liability Incurred by Reich in Relation to Territory Subsequently Severed from Reich—Whether Federal Republic under Duty to Discharge Liability.

River and Canal Administration of Pillau Case.

German Federal Republic, Court of Appeal of Schleswig.
May 22, 1951.

The Facts.—The River and Canal Administration of a locality situate in a part of Germany severed from the former Reich after the end of hostilities in the Second World War, had incurred certain liabilities towards the plaintiff at a time when the Reich was still in existence. The plaintiff now brought an action against the Federal Republic of Germany and contended that the latter, being identical in law with the former Reich, was liable for the debt owing to him. On behalf of the Federal Republic it was contended that the liability of the Federal Republic was limited to debts incurred within and relating to territory now forming part of the Federal Republic.

Held: that the action must fail. There was no identity in law between the Federal Republic of Germany and the former Reich, and the Federal Republic was not liable for debts incurred in and in relation to territory not now forming part of the Federal Republic. The Court said:

"The German Reich did not become extinct by virtue of the capitulation or any subsequent legislative enactment of the Occupying Powers. The question as to the continued existence of the Reich as an entity endowed with legal personality must therefore be answered in the affirmative.[1] The Federal Republic is limited territorially to the territory of the three Western Zones of occupation, and is only the West German Federal Republic in Germany. Accordingly, the German Reich and the Federal Republic are not identical. Article 134 of the Basic Law (Constitution) is concerned with the assets and liabilities of the Reich, and according to this provision the assets of the Reich become, in principle, the assets of the Federal Republic. However, paragraph 2 then provides as follows: 'In so far as these assets were, according to their original purpose, destined mainly for administrative purposes which by virtue of the Basic Law do not form part of the administrative duties of the Federation (Federal Government), they shall be transferred, without consideration, to the authorities which are now competent for the discharge of these duties . . . and to the "Länder"'. It follows from this wording that Article 134 does not contain any provision to the effect that the assets of the former Reich have now become the assets of the Federation or the 'Länder', nor does it indicate what is to be the fate of the liabilities. . . .

---

[1] The Court of Restitution Appeals of Nuremberg, in an elaborate judgment of January 25, 1951, affirmed the continued existence of the German Reich as a legal entity. The case was concerned with a claim against the Reich for the repayment of monies paid to the latter in pursuance of discriminatory legislation. The Court gave judgment against the Reich and pointed out that declaratory judgments against the Reich were permissible, notwithstanding that for the time being they were not enforceable: *RzW*, 2 (1951), p. 106.

"Although it is true that Article 89 of the Basic Law provides that the Federal Republic is the owner of the waterways of the former Reich, the plaintiff cannot rely on this provision in support of his case. It does not follow from this provision that the defendants, the Federal Republic, are responsible in law for all the liabilities of the Reich relating to the waterways of the latter. On the contrary, we agree with the Court of first instance which takes the view, by reference to the Law concerning the Financial Affairs of the German Federal Railways of March 2, 1951 (*BG Bl.*, p. 155), that liability is limited to debts which are referable, in the territorial sense, to the territory of the Federal Republic. This view is supported by the consideration that the Federal Republic has no legal means of possessing itself of the assets of the German Reich beyond the Oder–Neisse line, and that consequently the legislature had no reason to take over the debts connected with these assets. . . ."

[Report: *NJW*, 4 (1951), p. 723.]

States—Continuity of—Germany after the Second World War—Property Confiscated by German Reich in Territory of a German State ("Land")—Collapse of Reich—Whether "Land" liable to Grant Restitution—The Law of Germany. **Case No. 18**

RESTITUTION OF PROPERTY (RHEINLAND-PFALZ) CASE.

German Federal Republic, Court of Appeal of Neustadt.
November 7, 1950.

THE FACTS.—The applicant instituted proceedings for the restitution of certain property of which he had been deprived by virtue of discriminatory acts of the executive authorities of the German Reich while the latter was still in existence as constituted until 1945. The property was situate in the territory of the "Land" Rheinland-Pfalz, and the applicant instituted proceedings against the latter, his contention being

Case No. 18 *Contd.*

that this "Land" was the successor of that part of the territory of the Reich in which the property was situate, and was therefore liable for torts therein committed by the Reich authorities. On behalf of the "Land" Rheinland-Pfalz it was contended that the Reich was still legally in existence and that proceedings could be instituted against any of the "Länder" in respect of torts committed within their territories by the authorities of the Reich while the latter was still functioning as a State.

Held: that the application must fail. The "Land" Rheinland-Pfalz was not the successor of the Reich, and the action must be dismissed as having been brought against a defendant who was not liable to be sued. The Court said:

"The 'Land' Rheinland-Pfalz never became the successor of the German Reich. The general view of writers and of the judiciary, which is shared by this Court, is to the effect that the German Reich has not ceased to exist as a State by virtue of the capitulation, and that it was not dissolved subsequently by any legislative enactment of the Occupying Powers. Nor has the Constitution of the Federal Republic brought about any change in this legal position. On the contrary, the continued existence of the Reich as a legal entity, from the point of view of international as well as constitutional law, must be affirmed, having regard to the basic concept underlying the Bonn Constitution, which aims at the unification of all Germans after the disappearance of the division of Germany into zones, and at the re-establishment of the German Reich. Although the Constitution does not contain any provision governing the liability of the Federal Republic for the debts of the Reich—the subject being apparently reserved for legislation by means of a federal law, as envisaged in Article 134 (4) of the Constitution—Article 134 of the Constitution, by virtue of which the property of the Reich becomes in principle the property of the Federal Republic, expresses the notion that the Federal Republic is linked to the German Reich so far as concerns matters of property.

"Article 3 of the French Ordinance of June 3, 1949, provides that such assets as belonged directly or indirectly to the Reich on May 8, 1945, shall, for the time being, be taken into possession by the 'Land' in whose territory they are situate. The 'Land' is merely under a duty to administer such assets for and on behalf of the German State, which enjoys superior status vis-à-vis the 'Länder', and which is recognised by the authorities of the Occupying Power. It follows that the Occupying Powers themselves recognise the continued existence of the German Reich as a legal entity. . . . In the result, it may be said that the 'Land' Rheinland-Pfalz has not become the successor of the Reich and is not liable for the debts of the latter, either by reason of any partial taking over of assets or by virtue of any specific legislative enactments. The ' Land ' Rheinland-Pfalz was therefore justified in denying its *locus standi* as a defendant." [1]

[Report : *RzW*, 2 (1951), p. 54.]

Continuity of States—Incorporation of Austria into German Reich—Subsequent Separation of Austria—Whether Austria Continued as a Member of Berne Copyright Union—Protection of Copyright of German Nationals in Austria. **Case No. 19**

INFRINGEMENT OF COPYRIGHT (AUSTRIA) CASE.

Austria, Supreme Court. June 4, 1951.

THE FACTS.—Between January 31 and June 7, 1948, the appellant published a novel in serial form in an Austrian newspaper of which he was the editor. The copyright in the novel was vested in B., a German national, who was the author thereof. The appellant was convicted of the criminal offence of " intentional infringement " of B.'s copyright, in accordance with the relevant provision of the Austrian Copyright Act, and he now appealed against his conviction. It was contended on his behalf, as far as here material, that the works of German authors were not entitled to copyright protection in Austria because Austria had failed, after the re-establishment of her independence in 1945, to accede to the Berne Copyright Convention as an independent party ; and further, that even if Austria had remained a member of the Berne Union throughout the period of her incorporation into the German Reich and after the re-establishment of her independence, there were such legitimate doubts as to her continued membership that the infringement could not have been intentional, as required by the Austrian Copyright Act.

Held: (i) that Austria had remained a member of the Berne Union throughout ; but (ii) that Austria's official declaration that she had always considered and still considered herself to be a member of the Berne Union was only made after the alleged commission of the appellant's offence, and that it

---

[1] See also the judgment of the Board of Review of Herford, of February 5, 1951, in which it was held that the " Land " of North Rhine-Westphalia was not the successor of the Reich: *RzW*, 2 (1951), p. 119. The continued existence of the German Reich was also affirmed by the Federal Supreme Court in a judgment of June 28, 1951 : BGHZ, 3 (1951), p. 1. The following passage appears in that judgment (at pp. 6–7) : " Such claims (by former civil servants of the Reich against a ' Land ' of the Federal Republic) cannot be derived from succession in the strict sense. There cannot be succession because although the German Reich lost its legal capacity to act in the realm of international and public law by reason of its collapse, it did not disappear or lose its legal personality. . . . While a debtor retains his legal personality without change, there is no room for universal succession." The Court accordingly held that the "Länder" were not the successors in title of the German Reich.

Case No. 19 *Contd.*

was therefore feasible that the appellant's infringement was not intentional ; (iii) that the case should therefore be sent back to the Court of first instance, in order that the latter might determine whether the appellant was justified in believing that the works of German authors were not entitled to copyright protection at the material time, and whether accordingly the infringement had been committed intentionally or unintentionally. The Court said :

" Austria acceded to the Convention . . . with effect from October 1, 1920. Austria also belonged to the Berne Union while forming part of the German Reich and within the latter's factual sphere of sovereignty. After the liberation of Austria in 1945 Austria's membership of the Union was at first denied by the Bureau of the Union itself. Austria does not appear in the official list of members published by the Bureau of the Union in respect of the years 1946–1948. An article published at the beginning of 1946 in the unofficial part of the Union's publication states that Austria is no longer a member of the Union, by reason of her severance from Germany, and the hope is expressed that Austria will again become a member. The article customarily published in the unofficial part of the Union's publication and dealing with the development of the Union, which appeared in 1948, expresses a somewhat different view.

" It was not until the issue published on June 15, 1948, that mention was made in the official part of the publication of the Union of a statement made by the Austrian Government that the Republic of Austria considered itself a member of the Union from the date of its accession, *viz.* October 1, 1920, and that without interruption Austria had always considered herself bound by all the duties resulting from such uninterrupted membership. The continued existence of all Austrian rights, the statement adds, had remained unaffected by the involuntary occupation of Austria by Germany. At the opening of the Brussels Conference, which was held between June 5 and 26, 1948, the said statement of Austria was duly noted, and all the delegates of the countries taking part in the conference unanimously—only Yugoslavia abstaining—recognised Austria, which had meanwhile paid all the contributions falling due after her liberation, as a member of the Union. The uninterrupted membership of Germany and Austria is thus established in the objective sense. It follows, however, from what has been said above that legitimate doubts were voiced, by those well qualified to know, as to whether Austria was a member of the Berne Union between the date of her liberation in 1945 and the Brussels Conference of 1948. In so far as concerns the subjective element of the offence, therefore, the contention of the accused that, having regard to various publications perused by him, he took the view that the works of German authors were not entitled to copyright protection in Austria, should not have been simply ignored."

[Report: *SStr.*, XXIV (1951), p. 106.]

States—Continuity of—Severance of Upper Silesia from German Reich—Liability of State Employee for Tort Committed in Upper Silesia Prior to Severance—Whether Federal Republic of Germany Liable.

See Case No. 29 (*Personal Injuries* (*Upper Silesia*) *Case*).

States — Continuity of — International Organizations — Pan-American Union and Organization of American States.

See Case No. 138 (*Pan-American Union* v. *American Security and Trust Company*).

VI.—Extinction of States

States—Extinction of—Baltic Republics—Absence of Formal Recognition of Annexation—Nationality—As Affected by Changes of Sovereignty—Incorporation of Latvia into the U.S.S.R. **Case No. 20**

PULENCIKS *v.* AUGUSTOVSKIS.

Belgium, Tribunal Civil of Brussels. April 5, 1951.

THE FACTS.—This was an action in divorce. Both parties were of Latvian origin and had last held Latvian passports. The question before the Court was whether the law to be applied to the case was Latvian law or the law of the U.S.S.R.

Held: that the law of the U.S.S.R. must be applied. The Court said:

"The petitioner contends that both parties are Latvian nationals and that, accordingly, Latvian law must be applied in this action for divorce.

"However, in 1940 Latvia was occupied by the U.S.S.R. A Soviet Socialist Republic of Latvia was created and has been incorporated in the U.S.S.R. for over ten years.

"It is irrelevant to inquire whether the Belgian Government has made a public declaration concerning the disappearance, in the circumstances, of Latvia as an independent State which arose out of the fate of the Tsarist régime and the first Russian revolutionary régimes. The civil law and the settlement of a civil dispute must be related to a situation existing in fact rather than to diplomatic contingencies.

"In public international law changes in the structure of States and the distribution of governmental power can still be

Case No. 20 *Contd.* brought about by violence. The annexation of the entire territory of a State deprives the former rulers of the annexed State, unilaterally and by the use of force, of all authority, and the State ceases to exist. The U.S.S.R. effectively occupies Latvia and assumes the exercise of governmental authority. It has thus shown its will to incorporate Latvia in its own territory, and demonstrated that it is capable of occupying the annexed territory for more than ten years already.

" At present no known Government of the independent republic of Latvia exists. No diplomatic or consular representative of such a Government is accredited to Belgium. No Belgian diplomatic or consular representative is any longer accredited to the former Government in Riga, or anywhere else in Latvia. There is only a Belgian Embassy, which has a consular section, in Moscow, and a similar establishment of the U.S.S.R. in Brussels.

" Latvia has thus ceased to exist as an independent State which could confer a nationality on persons linked to it. While the Latvian nation and people have not entirely perished, there is not at present a Latvian State, and therefore also no Latvian nationality. Annexation and incorporation bring about a change of nationality. Accordingly, the parties, who formerly had Latvian nationality, are now subject to Soviet law, their present national law, in matters concerning status and capacity, and in particular for the purpose of divorce."

[Report : *Pasicrisie belge* (1952), III, pp. 40–41.]

States—Extinction of—Attributes of Statehood—Indian States Absorbed by the Union of India—The Law and Constitution of India.

See Case No. 8 (*State of Seraikella and Other States* v. *Union of India*).

States—Extinction of—Absence of Formal International Act—Extinction of Latvia.

See Case No. 82 (*Gerbaud* v. *Meden*).

B—COMPOSITE AND DEPENDENT STATES AND TERRITORIES

II.—British Commonwealth of Nations

British Commonwealth—Independent Members of—Pakistan Federation—Whether Entitled to Immunity from Jurisdiction of English Municipal Court.

See Case No. 50 (*Kahan* v. *Pakistan Federation*).

III.—Protected States and Protectorates. Dependent States

Protectorates—Position of Morocco—Nationality—Acquisition of—Military Service. **Case No. 21**

In re MONTORO.

France, Tribunal Civil de Marseille. March 2, 1951.

THE FACTS.—The petitioner was born in 1908 in Morocco, of Spanish parents. In 1942 he enlisted voluntarily in the French army, and served until 1946. He now claimed French nationality on the basis of Article 3 of the French Nationality Law of 1927, which provides that persons born in France of alien parents who enlisted voluntarily, thereby opted for French nationality.

Held: that the petitioner was not a French national, since he was not born in France, and therefore not entitled to invoke Article 3 of the French Nationality Law. The Court said:

"Morocco is a sovereign State. Its territory is not that of France. Article 3 of the Law of August 10, 1927, is thus not applicable to Montoro, since he was born outside France.

"Service in the French army, conscripted or voluntary, does not create a right to French nationality in a person who does not otherwise satisfy the required legal conditions."

[Report: *Recueil Sirey*, 1952, *Jurisprudence*, II, p. 114.]

Protectorates—Tunis—Status of Tunisian Nationals in France **Case No. 22**

CABET DE CHAMBINE *v.* BESSIS.

France, Court of Appeal of Paris. February 22, 1951.

THE FACTS.—The respondent, a Tunisian citizen, sought to recover an apartment occupied by him before the war, and now occupied by the appellant, by virtue of an Ordinance of November 14, 1944, which provided that persons who were compelled to leave their place of residence as a result of the war should be entitled to recover possession of it. The appellant invoked a Law of May 7, 1946, which laid down that the benefits of the Ordinance of 1944 could not be invoked by aliens unless they had fought in the French armed forces, and contended that the respondent was accordingly not entitled to recover the apartment. On behalf of the respondent it was contended that the law of May 28, 1943, concerning the application to aliens of the laws concerning leases provided that such laws necessarily reserve the case of aliens who are nationals of countries which give reciprocal treatment to French nationals, or

Case No. 22 *Contd.*

of aliens who are by treaty exempt from such reciprocity. It was further contended on behalf of the respondent that Tunisian nationals were assimilated to French nationals in France.

Held: that the respondent was entitled to recover possession of the apartment. Tunisian nationals in France were assimilated to French nationals. The Court said :

" The Law of March 28, 1943, is inapplicable. . . . The respondent does not refer us to any treaty, any law, or even any judicial decisions giving French nationals in Tunisia reciprocal treatment in the meaning of that Law.

" On the other hand, a Tunisian national, although in law an alien, is a French protected person, and, as such, assimilated to French nationals in the matter of civil rights. Article 81 of the Constitution of October 27, 1946, provides that all French nationals and nationals (' ressortissants ') of the French Union are citizens of the French Union, which entitles them to the rights and privileges set forth in the Preamble to the Constitution, according to which France and the oversea peoples form a union based on the equality of rights and duties, without distinction of race or of religion. Tunisia belongs to that community which France has formed with all the oversea countries which are under its care as a result of treaties of protectorate. Its subjects can accordingly claim the benefits of Article 81 of the Constitution and thus of the civil rights enjoyed by French citizens."

[Report : *Revue critique de Droit international privé,* 40 (1951), pp. 643–644.]

Case No. 23

States—Dependent States—Position of Andorra—Aliens—Security for Costs.

MASSIP *v.* CRUZEL.

France, Court of First Instance of Perpignan.
December 6, 1951.

THE FACTS.—This was an action for the recovery of a debt. A preliminary question before the Court, raised by the defendant, was whether the plaintiff, a native of Andorra, was required to give the security for costs normally required from aliens instituting actions against French nationals.

Held: that the plaintiff was not required to give security for costs. The Court said :

" Andorra is not a foreign State. It is not even a sovereign State able to conclude diplomatic conventions. Andorra is a Principality, the co-ruler of which is the head of the French State, the President of the French Republic. In law and in fact it is under the protectorate of France.

" Judgments rendered by French Courts in criminal matters are executory in Andorra, and it is not necessary to have recourse to the procedure of extradition. The Superior Court of Andorra, which is composed exclusively of French Judges and which sits at Perpignan, gives final judgments in '*tercera sala*'. These judgments are rendered 'in the name of the President of the French Republic'—who is at the same time co-ruler of Andorra—and who, in that second capacity, ensures the execution of decisions taken in his name in virtue of his first capacity.

"On being consulted by the Court, the Prefect of the Pyrénées-Orientales, permanent delegate of France to Andorra, explained in a letter dated November 28, 1951, that Andorran nationals come to France with a passport issued by the General Syndic of the Valleys, on which the Provost of France in Andorra affixes his visa which enables them to exercise any activity without further administrative formalities. The text of that visa is as follows: 'the holder of the present passport is exempt from the requirement to obtain an alien's identity card, and may exercise in France any profession or hold any employment without further formality. This note authorizes him to reside in France without limitation of time.'

"In commenting on these administrative provisions the Permanent Delegate expresses the view that the word 'passport' does not appear to correspond to the character of the document so issued and visaed by the Andorran authorities, since that document is (*a*) a travel document; (*b*) an identity card; (*c*) a labour permit. He points out that only nationals of a sovereign State can hold a national passport, and that this is not the case with respect to Andorran citizens. He concludes that Andorrans enjoy French diplomatic and consular protection in foreign countries, and that they can thus not be assimilated to aliens, but must be regarded as French protected persons.

"It appears from these explanations given by the Permanent Delegate that it is the visa of the Provost of France which gives the document issued to Andorrans under the title of 'passport' its official character and full value.

"Even if it were admitted that Andorra must be considered to be a foreign State, the principle of legislative reciprocity would entitle Andorrans to exemption from giving security for costs, since no such security is required in Andorra of aliens appearing before Andorran courts.

"Finally, Article 17 of the Ordinance of November 2, 1925, exempts from the requirement to give security for costs aliens who are considered to be privileged residents. It has been shown above that the visa of the Provost of France affixed on the *laissez-passer* of an Andorran coming to France, gives the latter greater privileges than are enjoyed by privileged aliens."

[Report: *Recueil Sirey*, 1952, *Jurisprudence*, II, pp. 151–152.]

Case No. 24 **Protectorates and Protected States—British Protected States—Status of—Whether Regarded in Court Established There as Foreign Territory—Zanzibar—Applicability of English Law.**

JANI *v.* JANI AND OTHERS.

Eastern Africa, Court of Appeal.
(Sir Newnham Worley V.-P., Sir Barclay Nihill J.,
Murphy A.C.J.)
November 1, 1952.

THE FACTS.—This was an appeal from a decision of the British High Court in Zanzibar in which the wife of the appellant had successfully sued for maintenance on her own behalf and on behalf of his minor daughters. Zanzibar is a State under British protection. The parties were Hindus and subjects of the Republic of India, and it was admitted in the pleadings that they were governed by Hindu law. The Court of Appeal found itself unable to decide from the facts whether the jurisdiction of the High Court of Zanzibar was applicable and observed : " It has been assumed throughout these proceedings that H.B.M. High Court for Zanzibar was the proper forum for the trial of this dispute. Whether that assumption is correct or not depends upon whether the parties, or any of them, are or are not British subjects or British protected persons : *see* sections 3 and 6 of the Jurisdictional Decree, 1908, and *see* also *The Dual Jurisdiction*, by J. H. Vaughan, 1935, pages 17 and 18." The Court then said : " So long as the Sovereign of Great Britain was Emperor of India no doubt could exist as to the status of His Indian subjects, but I confess I do not know what is now their status since the establishment of the Republic of India. In fact, there is no evidence in the present case as to where any of the parties were born or as to their original or any subsequently acquired status. If they are not ' persons subject to this Order ' as defined in section 6 of the Jurisdiction Decree but are subjects of a non-Christian power (as I believe the Republic of India to be) then they are subject to H.H. the Sultan's Court. There may not be, and I believe there is not, any great practical difference between proceedings in the two Courts, but as this is a question affecting jurisdiction, it is, I venture to suggest, a matter to which the Courts of Zanzibar should always direct their attention. . . ."

The Court was also confronted with the question whether the British High Court of Zanzibar (assuming that it had the necessary jurisdiction) should have applied Zanzibar law, which in turn raised the question whether and how far English law was applicable in the proceedings of the British Court. The

Court of Appeal discussed the juridical basis of the jurisdiction of the British Court in Zanzibar.

Held (*inter alia*): that a Judge acting within the limits of Her Majesty's jurisdiction in Zanzibar is a Zanzibar Judge and is bound to take judicial notice of Zanzibar law, whatever it may be, applicable to the case before him. The Court said:

". . . All the parties are Indians residing in Zanzibar, and it was admitted on the pleadings that they are governed by Hindu law.

" The situation is one of some complexity. The root of the jurisdiction is the treaty grant or other matter by which the Queen has power and jurisdiction in Zanzibar. She thereby becomes an authority in the foreign territory of Zanzibar, though exercising her powers quite independently of the will of the Sultan. On that state of things the Foreign Jurisdiction Acts supervene for the purpose of binding all the subjects of the Queen; and they enable her to order in what way her authority in Zanzibar shall be exercised. She orders that it shall be exercised in accordance partly with certain Anglo-Indian laws and partly with English law. The English law again for certain purposes, of which the present purpose is one, incorporates the local law of Zanzibar. But throughout the matter Zanzibar remains foreign territory, and the Queen and her officers are acting as Zanzibar authorities by virtue of the power which she has acquired and which is within its limits a sovereign power. It results that a Judge acting within these limits is a Zanzibar Judge and is bound to take judicial notice of the Zanzibar law, whatever it may be, applicable to the case."

[Report: (1952) 19 E.A.C.A. 187.]

IV.—Mandated and Trust Territories

v.—Nationality in Mandated and Trust Territories

Mandates—Nationality of Inhabitants of Mandated Territory—Palestinian Nationals—Whether " Nationals of the United Nations ". **Case No. 25**

PALESTINIAN NATIONALITY CASE.

German Federal Republic, Court of Restitution Appeals of Nuremberg. November 15, 1951.

THE FACTS.—The relevant German legislation providing for a reform of the German currency conferred certain benefits upon persons who, on May 8, 1945, were " nationals of the United Nations ", the latter term including, as far as here

Case No. 25 *Contd.* material, nationals of Czechoslovakia and the United Kingdom. By virtue of a Law enacted in 1951, the term " United Nations " was defined as including, *inter alia*, territories under the administration or control of countries formerly at war with Germany, where such territories had taken part in the war against that country by virtue of the Mandatory having been engaged in that war. The appellant was a Czechoslovak national by origin. In 1938 he emigrated to Palestine, and in 1943 he acquired Palestinian nationality. It was contended on his behalf that as a person who possessed Palestinian nationality on May 8, 1945, he was, by virtue of the Law enacted in 1951, entitled to claim the benefits which the German currency legislation conferred upon " nationals of the United Nations ".

Held: that Palestine, as a territory under the administration of the United Kingdom, had taken part in the war against Germany, and that the appellant's contention must accordingly be upheld. The Court said :

" The file shows that L. was a Palestinian citizen on the relevant date, *viz.* on May 8, 1945. He was a Czechoslovak national in 1938 when he emigrated to Palestine. He acquired Palestinian citizenship on February 1, 1943. On the other hand, there are certain indications that he was a Czechoslovak national until July 17, 1945. The list promulgated by Military Government refers to Czechoslovakia, but not to Palestine, as one of the United Nations. If we were to concede L.'s Czechoslovak nationality, he would undoubtedly be entitled to claim the benefits due to nationals of the United Nations. The lower Court, however, without sufficient evidence, reached the conclusion that he renounced his Czechoslovak nationality. If that were, in fact, the case, then the decision of the lower Court would be in accordance with the law as then in force. The Law of 1951, however, defined the term ' United Nations ' in a different manner." The Court then referred to the wider definition referred to in the headnote, and continued :

" The territory of Palestine, where the appellant acquired his nationality, was under the administration and control of the United Kingdom. That part of Palestine which became the State of Israel took part in the war against Germany, by virtue of the fact that the United Kingdom was at war with Germany. It follows, without the slightest doubt, that the appellant is entitled to claim the benefits referred to above."

[Report : *RzW*, 3 (1952), p. 33.]

D—RECOGNITION

[See also above, A, IV, *Recognition of Acts of Foreign States and Governments*; and Part IV, JURISDICTION: A, I, *Territorial*.]

I.—Of States

Recognition—Of States—Absence of Recognition—Effect of—Withdrawal of Recognition—Indian State Absorbed by Union of India—Attributes of Statehood—The Constitution and Law of India.

See Case No. 8 (*State of Seraikella and Other States* v. *Union of India*).

II.—Of Governments

Recognition of Governments—Effect of—Executive Determination of Recognition—Jurisdiction of a Court to Aid a Foreign Ambassador to Enforce His Orders to His Subordinates—Ambassador of the Republic of China in the United States of America. **Case No. 26**

REPUBLIC OF CHINA *v.* PANG-TSU MOW *ET AL.*

United States, District Court, District of Columbia.
December 10, 1951.

THE FACTS.—The plaintiff filed a complaint for an accounting and an injunction against the defendants, officers of its Air Force, to account for records and funds of the Chinese Air Force Office for purchases in the United States. The defendants had refused to comply with an order directing them to turn over the funds and records under their control to a newly created purchasing office. The order in question had been issued as the result of allegations of misappropriation of funds by the defendants. The defendants moved that the complaint be dismissed for lack of jurisdiction and other reasons. In particular, they contended that since there was an as yet unresolved question within the Government of the Republic of China as to the identity of its President, an action brought at the instance of the Ambassador of China, who in their view had not title to act, could not be entertained.

Held: that the preliminary injunction sought by the plaintiffs must issue. The Court said:

" The recognition by the political department of the United States government of a foreign government is conclusive of its legal status as far as the United States Courts are concerned.

Case No. 26 *Contd.* *Oetjen* v. *Central Leather Company*, 1918, 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726. In a case decided the same day by the Supreme Court, the Court considered the effect of recognition by the United States government of the government of Carranza as the *de facto* and later the *de jure* government of Mexico and said: ' It is settled that the courts will take judicial notice of such recognition, as we have here, of the Carranza government by the political department of our government (*Jones* v. *United States*, 137 U.S. 202, 11 S.Ct. 80, 34 L.Ed. 691), and that the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory'. *Ricaud* v. *American Metal Company, Ltd.*, 1918, 246 U.S. 304, 38 S.Ct. 312, 313, 62 L.Ed. 733. The Court has received through an interchange of letters with the State Department a certification that this government recognizes the Honorable V. K. Wellington Koo as the duly authorized ambassador of the Republic of China in the United States. This procedure of obtaining such certification is well established. *Sullivan* v. *São Paulo*, D.C., 36 F. Supp. 503.

" As long as the political department of the United States recognizes one as the proper ambassador or representative of a foreign government in the United States, the Court must accept the acts of this agent as the acts of his government, *Agency of Canadian Car & Foundry Company, Ltd., et Al.* v. *American Can Company*, 1919, 258 F. 363, 368, 6 A.L.R. 1182. If a national of this foreign power challenges the right of this person to the post of ambassador, then the question must be decided by our political department, the executive department of the United States. This Court cannot entertain the statement of a citizen of a foreign country that he is the president of that country and that the ambassador is not authorized to act as he has when the State Department has certified that person as the recognized ambassador to this country. Neither the defendants nor Mr. Li Tsung-Jen, duly elected vice president of the Republic of China and claimant to the presidency, challenge the ambassadorial rank now held by Mr. Koo. Counsel asserts that Mr. Li plans to file a protest with the United Nations General Assembly to seek a determination of the legality of Chiang Kai-Shek's position as President of the Republic of China. The Court obviously cannot consider proposed actions of one who is not even a party to this action.

" The letter of the Honorable James Webb, Acting Secretary of State, to the Court under seal of the State Department, dated November 28, 1951, is conclusive of Ambassador Koo's position as the duly recognized ambassador of the Republic of China to the United States. In the case of *Agency of Canadian Car & Foundry Company, Ltd., et Al.* v. *American Can Company*, *supra*, the Court of Appeals for the Second Circuit considered the extent of the authority of an ambassador and the effect of his recognition by the State Department, and ruled, ' So that the certificate of the Secretary of State, above referred to, certifying to the official character of Boris Bakhmetieff as the Russian ambassador to the United States is not only evidence, but it is the best evidence, of Mr. Bakhmetieff's diplomatic character, and is to be regarded by the courts as conclusive of the question, and the court could not proceed upon argumentative and collateral proof. And the certificate of Mr. Bakhmetieff, given under his hand and seal as Russian ambassador, concerning the membership and powers of the Russian Supply Committee, must be regarded in like manner as an authoritative representation by the Russian government on that subject, and as such binding and conclusive in the courts of the United States against that government on the matters to which it relates.'

" The law of that case requires this Court to give conclusive effect to the authorization of Ambassador Koo to institute this suit on behalf of his government.

" Counsel for the defendants concede the power of this Court to entertain this suit otherwise, but contend that the Court should decline to take jurisdiction because of the grave international problems involved, and that fact is probably the strongest reason for exercising jurisdiction. No problem of international law is before the Court. The problem of the applicable law herein, if a problem there be, is one of conflict of laws, and since the acts complained of which are cognizable in this Court—the acts of the ambassador—took place in this forum, the Court is bound to apply the law of the forum.

" For purposes of illustration, assume that the Court declined jurisdiction of this case. This would leave a friendly power with no alternative but to resort to acts of force to deal with its citizens on foreign soil. The orderly administration of justice and the policy of co-operation with a friendly foreign power require this Court to exercise its jurisdiction to aid that country's control over its representatives in the United States. The Court will not interfere in the internal affairs of a foreign country, but no such interference is prayed for in this action. The Court is merely exercising its jurisdiction in aid of the power of an ambassador to this country to enforce his orders and mandates to his subordinates resident here. Accordingly, the Court rules that the case is properly brought and this Court has jurisdiction over the subject matter and the parties.

" The act of the Court in appointing a disinterested person, supplementing the restraining order, to aid in maintaining the *status quo*, pending the outcome of this litigation, is also challenged. Counsel for defendants alleges that this order has interrupted the operations of the Chinese procurement program. If this is so, it is only because the defendants make it so. Ambassador Koo has delegated persons to take charge of this program and continue its functions, but they have been

Case No. 26 *Contd.*

prevented from so doing because the defendants have refused to relinquish their posts as ordered. Defendants contend further that this order is in violation of Rule 34, F.R.C.P., T. 28 U.S. Code. The copious citation of authority in support of this argument is not applicable here. There is, not merely, an allegation in the complaint that the records of the Chinese Air Force are the property of the Republic of China, but defendants do not deny this fact. They deny only the right of the Ambassador to assert this ownership on behalf of the Republic of China, and also take possession of these records and funds as agent for the government. The Court has pointed out above that Ambassador Koo has the right and the power to act for his government in matters under his government's control. The order issued in this case merely gives the authorized agent of the Republic of China access to property belonging to the Republic of China. It also seeks to maintain the *status quo* under the Court's broad equity powers to maintain control of those books, records and other things which are the subject of the ultimate disposition of this case. Rule 34 certainly does not encompass a situation where a litigant seeks access to his own property.

" The preliminary injunction will issue in terms provided by the Court and Mr. McCracken will continue in his capacity with rights and duties as prescribed by the Court, subject to further modification by the Court.

" Therefore, the motion to dismiss is overruled, the preliminary injunction will be granted, and the order designating a disinterested person to take possession of the premises will be continued subject to future modifications by the Court. An appropriate order will be prepared."

[Report : 101 F. Supp. 646.]

NOTE.—Affirmed, with opinion, by the United States Court of Appeals, 201 F. 2d 195 (1952) ; a petition for writ of *certiorari* to the Supreme Court of the United States was denied, 345 U.S. 925, 73 S.Ct. 784, 97 L. Ed. 1356 (1953). See the related case of the same name, 105 F. Supp. 411 (1952), *International Law Reports*, 1952, Case No. 40.

V.—Of Annexation

Recognition—Of Annexation—Effect of Non-Recognition—Executive Determination of Question of Recognition—Recognition of Foreign Legislation Adopted by an Unrecognized Government—Application of Rules of Conflicts of Laws to Foreign Legislation—Foreign Confiscatory Decrees. **Case No. 27**

LATVIAN STATE CARGO & PASSENGER S.S. LINE *v.* MCGRATH, ATTORNEY-GENERAL.

United States, Court of Appeals, District of Columbia Circuit. February 23, 1951.

THE FACTS.—The appellant sought to recover funds representing the proceeds of insurance and the earnings of three vessels, sunk by enemy action in 1942, which proceeds had been vested by the Alien Property Custodian. The three vessels were originally owned by citizens and residents of the Republic of Latvia. After the occupation of Latvia by the U.S.S.R. in 1940, the nationalization of shipping enterprises was decreed. The vessels concerned were libelled in New York in 1941 by the pre-nationalization owners, and the appellant, a public corporation organized under the laws of the U.S.S.R., intervened. Trustees were appointed for the vessels, and, with the German invasion of Latvia, their interests were vested. With the restoration of Soviet rule and of the nationalization decrees, the appellant brought the instant claim, which was resisted by the appellee on the ground that the incorporation of Latvia into the U.S.S.R. and the nationalization decrees of the Latvian Soviet Socialist Republic had not been recognized by the United States, and that the executive policy of non-recognition was binding upon federal courts.

Held: that the judgment of the Court below granting the motion of the appellee for summary judgment must be affirmed. The Court said:

" The field in which the present dispute lies is a wide one, and much has been written upon the general subject. The cases and authorities have been collected elsewhere,[1] and it is unnecessary for us to venture upon a broad discussion of the general principles involved.

---

[1] *Guaranty Trust Co.* v. *United States*, 1938, 304 U.S. 126, 58 S.Ct. 785, 82 L. Ed. 1224; *Oetjen* v. *Central Leather Co.*, 1918, 246 U.S. 297, 38 S.Ct. 309, 62 L. Ed. 726; *The Maret*, 3 Cir., 1944, 145 F. 2d 431; *Banque de France* v. *Equitable Trust Co.*, D.C.S.D.N.Y., 1929, 33 F. 2d 202, affirmed, 2 Cir., 1932, 60 F. 2d 703; Connick, The Effect of Soviet Decrees in American Courts, 34 Yale L.J. 499 (1925); Borchard, The Unrecognized Government in American Courts, 26 Am.J.Int'l L. 261 (1932); 58 Harv. L.Rev. 612 (1945); 93 U. of Pa.L.Rev. 323 (1945).

Case No. 27 *Contd.*

" The conduct of foreign affairs is, of course, a function of the executive branch of the Government, and the judicial branch has no part in it or control over it.[1] It is settled by *United States* v. *Belmont* [2] and *United States* v. *Pink* [3] that if there is a formal act by the executive department, either of recognition or of compact, the courts must give full effect to the terms of such act. Our problem, however, does not deal with such an affirmative act.

" Moreover we do not have before us a mere failure to recognize in the absence of a strong executive policy against condoning in any way the Soviet occupation of Latvia. It might well be that in the absence of such a policy the usual rules applicable under the established doctrines of conflicts of laws would apply. Thus, in *Compañía Española de Navegación Marítima, S. A.* v. *Navemar* [4] and in *Salimoff & Co.* v. *Standard Oil Co.*,[5] the State Department refused to certify a policy of hostility to decrees of the unrecognized governments, and the courts accordingly applied those doctrines in arriving at their decisions. Even granting the application of such doctrines, however, there is no assurance that appellant should prevail here. There is, for example, the view suggested by Judge Goodrich, concurring in *The Maret*,[6] that in the absence of recognition of a foreign government the courts might deny effect to an act of that government which purports to change the ownership of a chattel absent from its borders. In a similar vein is the statement in *Compañía Española* v. *Navemar* [7] to the effect that, where confiscatory decrees are *in invitum*, actual possession by some act of physical dominion or control in behalf of the confiscating government is necessary. No such showing was made in the case at bar. And, furthermore, there is the possible view that, since the nationalization decrees here involved were confiscatory and thus contrary to the public policy of this country, our courts would in no event give them effect.[8] In the view we take, however, it is unnecessary to consider those possibly applicable rules.

---

[1] *United States* v. *Curtiss-Wright Export Corp.*, 1936, 299 U.S. 304, 57 S.Ct. 216, 81 L. Ed. 255.

[2] 1937, 301 U.S. 324, 57 S.Ct. 758, 81 L. Ed. 1134.

[3] 1942, 315 U.S. 203, 62 S.Ct. 522, 86 L. Ed. 796.

[4] 1938, 303 U.S. 68, 58 S.Ct. 432, 82 L. Ed. 667.

[5] 1933, 262 N.Y. 220, 186 N.E. 679, 89 A.L.R. 345.

[6] 3 Cir., 1944, 145 F. 2d 431, 444.

[7] *Supra* at 303 U.S. 75, 58 S.Ct. 432.

[8] *Fred S. James & Co.* v. *Second Russian Ins. Co.*, 1925, 239 N.Y. 248, 146 N.E. 369, 37 A.L.R. 720; *Petrogradsky Mejdunarodny Kommerchesky Bank* v. *Nat. City Bk.*, 1930, 253 N.Y. 23, 170 N.E. 479; *Sokoloff* v. *National City Bank*, 1924, 239 N.Y. 158, 145 N.E. 917, 37 A.L.R. 712; *Laane and Baltser* v. *Estonian State Cargo and Passenger Steamship Line*, [1949] 2 D.L.R. 641 (Can.Sup.Ct.). Compare also the results reached in litigation subsequent to the Civil War involving acts of Confederate state legislatures, where the courts inclined to a public policy view in according or denying validity to such acts.

" In the case at bar it appears that the non-recognition of the nationalization decrees was the result of a deliberate policy of the executive branch of the Government. The record contains three affidavits of the Secretary of State. In pertinent parts they read as follows :

" ' I Certify That the legal existence of the Treaty of Friendship, Commerce and Consular Rights, as well as of all other treaties between the United States and the Republic of Latvia, has not been affected by any of the acts of the Soviet regime which assumed power in Latvia in 1940, or of any subsequent regime in that country.

" ' I Certify that the incorporation of Latvia by the Union of Soviet Socialist Republics is not recognized by the Government of the United States.

" ' I Certify That the legality of the so-called " nationalization " laws and decrees, or of any of the acts of the Soviet regime which assumed power in Latvia in 1940, or of any subsequent regime in that country has not been recognized by the Government of the United States.' These affidavits are consistent with the announced foreign policy of this Government.[1]

" We are of opinion that when the executive branch of the Government has determined upon a foreign policy, which can be and is ascertained, and the non-recognition of specific foreign decrees is deliberate and is shown to be part of that policy, such non-recognition must be given effect by the courts. The rule applicable in such circumstances is the same rule applicable to an act of recognition. Any other treatment of a deliberate policy and act of non-recognition would reduce the effective control over foreign affairs by the executive branch to a mere effectiveness of acts of recognition. The control of the executive branch over foreign affairs must necessarily be broader than that.

" While this specific point was not before the Court in *United States* v. *Pink, supra*, the view which we have expressed was definitely indicated in the opinions in that case.

" We find ourselves in agreement with other courts which have either implicitly or explicitly recognized the policies of their governments in refusing to countenance the confiscation of vessels by Soviet regimes subsequent to the occupation of those countries by the Union of Soviet Socialist Republics and so have refused to effectuate those confiscations, regardless of

---

[1] Letter of Feb. 23, 1932, from Secretary of State Stimson, Dept. of State Press Releases, weekly issue 126, p. 205, Feb. 24, 1932, 1 Hackworth, *Digest of International Law* 334–335 (1940) ; Statement by the Acting Secretary of State, July 23, 1940, Press Release No. 354, N.Y. Times, July 24, 1940, pp. 1, 8 ; Letters from State Department to Governors of the States, N.Y. Times, March 30, 1948, p. 12 ; Art. 17 of the Charter of the Organization of American States, signed at Bogotá, March 30–May 2, 1948 ; Department of State Press Release No. 119, Feb. 15, 1951.

Case No. 27 Contd. the results which would normally be reached under the rules governing conflicts of laws."[1]

[Reports: 188 F. 2d 1000 (1951); 80 F. Supp. 683 (1948); '49 M.C. 117; *certiorari* to the Supreme Court was denied: 342 U.S. 816, 72 S.Ct. 30, 96 L. Ed. 617.]

NOTE.—The case is discussed in *Georgetown Law Journal*, 39 (1951), p. 660; *Journal of Public Law*, 1 (1952), p. 239; and *Virginia Law Review*, 37 (1951), p. 759.

Recognition—Of Annexation—Annexation of Danzig by Germany—Absence of International Recognition.

See Case No. 69 (*In re Nix et Al.*).

Recognition—Of Annexation—Absence of Formal Recognition—Incorporation of Latvia into the U.S.S.R.

See Case No. 20 (*Pulenciks* v. *Augustovskis*).

Recognition — Of Annexation — Non-recognition by United States and Great Britain of Annexation of Danzig by Germany.

See Case No. 68 (*In re Krüger*).

E—STATE SUCCESSION

I.—Succession to Rights

Case No. 28 **State Succession—Succession to Rights—Executors' Bond in Favour of Former Sovereign—Right of Subsequent Sovereign to Sue Thereon—The Law of Israel.**

ATTORNEY-GENERAL *v.* LEVITAN.

Israel, Tel Aviv District Court. February 4, 1951.

Supreme Court sitting as Court of Civil Appeals. May 3, 1954.

THE FACTS.—In this case the question at issue was simply whether the Attorney-General of Israel could sue on a bond previously given in favour of the Attorney-General of Palestine.

Held (by the District Court): that the question must be answered in the affirmative.

---

[1] *The Maret*, 3 Cir., 1944, 145 F. 2d 431; *The Kotkas*, D.C.E.D.N.Y., 1940, 35 F. Supp. 983; *In re Graud's Estate*, Sur., 1943, 43 N.Y.S. 2d 803; *Laane and Baltser* v. *Estonian State Cargo and Passenger Steamship Line*, [1949] 2 D.L.R. 641 (Can.Sup.Ct.); *Zarine* v. *Owners of SS Ramava* [1942] Ir.R. 148 (Ir.Sup.Ct.); *Boguslawski* v. *Gdynia Ameryka Linie*, [1950] 2 All Eng. 355 (C.A.). See also *Bernstein* v. *Van Heyghen Frères Société Anonyme*, 2 Cir., 1947, 163 F. 2d 246, and *Bank of China* v. *Wells Fargo Bank & U.T. Co.*, D.C.N.D.Cal., 1950, 92 F. Supp. 920, 39 Geo.L.J. 337.

The Court said : " The Attorney-General does not rely on the plea that the Government of Israel is the successor of the Government of Palestine, but on section 21 of the Law and Administration Ordinance, 1948, by which taxes and payments of every kind whatsoever which had not been paid to the Government of Palestine by May 14, 1948, shall be paid to the Provisional Government of Israel [subsequently : Government of Israel]. . . . The difficulty that arises here is whether the sum claimed by the Attorney-General from the defendant is included in the category of ' payments of every kind whatsoever ' within the meaning of section 21. Counsel for the defendant argues that it is not so for two reasons. First, the word ' payments ' appearing together with the word ' taxes ' has to be interpreted as referring to payments in the nature of taxes, such as rates of different kinds, or as payments for Government services and the like, but not as payments in respect of contractual obligations. Secondly, even if it is admitted that the word ' payments ' also applies to sums due under contracts, nevertheless the expression ' which had not yet been paid ' refers to liquidated sums due but not paid, and not to sums concerning which there is a dispute as to whether they are due at all.

" After considering this question I have formed the opinion that the expression ' payments of every kind whatsoever ' is wider than Counsel for the defendant argues. The words ' of every kind whatsoever ' mean simply what they say, and not only payments resembling taxes. But the real difficulty relates to the second argument. That is to say : would it not be proper to say that the intention here was to refer to sums which, during the period of the Mandate, were due for payment but which have not yet been paid ? If it is assumed that such was the intention, then a further question will arise, namely, when and in what circumstances can it be said that the sum became liquidated and due for payment ? What, for example, of an acknowledgement of a debt due to be paid during the period of the Mandate and dishonoured by the drawer on the basis of pleas, afterwards dismissed in a court of law, subsequent to the termination of the Mandate ? Is that sum a sum which was due during the Mandate, so that the Government of Israel can now claim it under this section ? Or is it necessary that not only should the sum have been due during the period of the Mandate, but that it also should not have been contested in that period, or, if contested, that judgment had been given during the period of the Mandate ?

" After much hesitation I have reached the conclusion that this section applies to every case in which the Government of Israel claims payment of any kind whatsoever on the basis of a claim which originated during the Mandate, and that the expression ' which had not been paid ', if it excludes anything,

Case No. 28 *Contd.*

only excludes sums which could not have been paid then because they were not due, the basis of the claim not having arisen ; for example, when the conditions stipulated in a bond had not yet been fulfilled. In other words, the correct interpretation of this section is, in my opinion, that every claim for the payment of a sum of money which the Mandatory Government could have claimed while it was in existence, passes to the Government of Israel. As mentioned, I have reached this conclusion after much hesitation, because the section is not well drawn up, and the draftsman tried to take a short cut when the long way round would have been better. But it appears to me that the real object of the Law is to vest in the Government of Israel the right to claim sums which the Mandatory Government could have claimed, and so long as the language of the Ordinance does not compel the Court to adopt a different view, it is preferable to give the section a meaning which will achieve the results intended by the legislator.

" In the present case, the claim is based on a bond which contains an absolute obligation to pay a defined sum of money, and only on the fulfilment of defined conditions will the undertaker be released from liability. These conditions include proper supervision [of the property of an absentee], and this condition was broken already during the period of the Mandate so that the Mandatory Government could have claimed the sum but did not do so. The cause of action arose, therefore, already during the period of the Mandate and, consequently, the Government of Israel is now entitled to claim the money and to prove the cause of action which arose then."

On appeal,

Held (by the Supreme Court) : that the decision of the Court below must be upheld. The Court said, referring to the difficulty of interpreting section 21 aforesaid : " In our view the problem was entirely dissipated a few days after the judgment of the District Court by the enactment of the State Property Law, 1951.[1] There is no doubt that, according to section 1 of that Law, the right of action was included in the property of the Government of Palestine, for, by definition, that property included all rights whether vested or contingent. By section 2 of that Law, property situate in Israel of the Palestine authorities is property of the State of Israel as from May 15, 1948. Therefore, this claim can be brought in the name of the Government of Israel. Finally, we will refer to another argument of Counsel for the appellant, to the effect that it was not the Attorney-General, but the person injured by the appellant's actions, who should have brought the action. That argument has no foundation. The bond was given to an official of a Government in the room of which the Government of Israel now exists. It is quite possible that the State appears in order to protect the rights of persons interested in the property, and it is quite possible that in appropriate circumstances the right of action under the bond might be transferable to the interested person for him to bring the action himself. But this does not detract from the right of action of the State in its capacity of beneficiary under the bond."

---

[1] *Laws of the State of Israel*, authorized translation from the Hebrew, vol. 5 (5711–1950/1), p. 45.

[Reports: *Pesakim Mehoziim*, 3 (1950–1951), p. 195; *Piskei-Din*, 8 (1954), 627, at p. 631; *Pesakim Elyonim*, 15 (1954), p. 385.]

NOTE.—For the application of section 21 to the payment of income tax due to the Government of Palestine before the termination of the Mandate, see *L.* v. *Inspector of Income Tax*, decided by the Tel Aviv District Court on March 11, 1952 [*Pesakim Mehoziim*, 7 (1953), p. 233].

II.—Succession with Regard to Contractual and Other Obligations, and Concessions

State Succession—Succession to Obligations—Severance of Part of Territory of State—Claim arising from Tort Committed by State Employee in Severed Part of Territory—Severance of Upper Silesia from German Reich—Whether Federal Republic of Germany Liable. **Case No. 29**

PERSONAL INJURIES (UPPER SILESIA) CASE.

German Federal Republic, Court of Appeal of Cologne.
December 10, 1951.

THE FACTS.—In 1943 the plaintiff sustained personal injuries as a result of a collision with a motor vehicle owned by the Postal Administration of the German Reich. The collision occurred in Upper Silesia which, at that time, formed part of the territory of the Reich and which, upon the conclusion of hostilities in the Second World War, was annexed by Poland. The plaintiff now brought an action for damages against the Federal Republic of Germany and alleged that his injuries were due to the negligent driving of the vehicle by a servant of the Postal Administration of the Reich. It was contended on his behalf, not only that the Postal Administration of the Federal Republic was identical with that of the former Reich, but also that the Federal Republic as such was identical with the former Reich, and that, accordingly, the Federal Republic was liable for all acts of negligence committed by servants of the Reich in any part of the latter's territory, notwithstanding that such territory was subsequently severed from the Reich. On behalf

Case No. 29 *Contd.* of the Federal Republic it was contended that there was no such identity as was alleged by the plaintiff and that the Federal Republic, in the absence of special legislation to that effect, was not liable for damages for torts committed in parts of the former Reich not now forming part of the territory of the Federal Republic.

Held: that the Federal Republic of Germany was not liable to the plaintiff in damages. The Court said :

" The former Supreme Court of the British Zone and the Supreme Court of the Federal Republic have previously held, with regard to the Federal Railways, whose legal position is akin to that of the Federal Postal Administration, that there is partial identity between the Federal Railways and the former Reich Railways, *viz.* personal and legal identity, ' subject to a territorial limitation ' to the territory of the Federal Republic. In view of the fact that the alleged liability of the Reich Postal Administration vis-à-vis the plaintiff arose wholly outside that territory and has no connection whatsoever with the latter, any liability of the Federal Postal Administration is out of the question.

" In so far as concerns identity between the Federal Republic and the German Reich, the same principles must apply. Even Krüger,[1] upon whom the plaintiff relies in support of his contention, obviously limits his view of the identity of Reich and Federal Republic to the territory proper of the Federal Republic. According to his view, too, ' we must apply the principle that all liabilities referable to a specific part of the territory must be assumed by the new State '. Having regard to the fact that the federal territory as now existing only constitutes a part of the territory of the Reich as it existed when the plaintiff's alleged claim arose, the practical result of holding the Federal Republic liable for all debts of the German Reich—regardless of when and where such debts arose—would indeed be untenable. Such unlimited liability cannot simply be founded on the doctrine of identity.

" The fact that Article 134 of the Constitution [of the Federal Republic] provides for the taking over, by the Federal Republic, of the assets of the Reich, and that it expressly reserves more detailed provision in the matter for future legislation, can reasonably be interpreted only as meaning that the whole complex of these far-reaching problems, including the question of liability for debts, must be provided for by legislation in the future."

[Report : *NJW*, 5 (1952), p. 1300.]

---

[1] In *Süddeutsche Juristenzeitung*, 1950, pp. 113 *et seq.*

State Succession—Succession with regard to Obligations Arising from Contract—Liability of Former German Reich as Charterer—Whether Federal Republic of Germany Liable—Set-Off and Counterclaim.

See Case No. 15 (*Collision in the Baltic Case*).

IX.—Continuity of the Law. Judgments of Courts. Pending Actions

Case No. 30

State Succession—Effect of—On Judgments of Courts—Merger of States—Merger of Part-Sovereign State Within a Union which is a Full Sovereign—India—Merger of Akalkot and Bombay—Effect of Judgments of Court Not of Competent Jurisdiction—Sections 13 and 20 of Indian Code of Civil Procedure.

BHAGWAN SHANKAR *v.* RAJARUM BAPU.

India, High Court of Bombay (*Full Bench*).
(Chagla C.J., Gajendragadkar and Dixit JJ.).
February 8, 1951.

THE FACTS.—The plaintiff obtained an *ex parte* money decree in the Court of the Joint Second Class Subordinate Judge at Sholapur on September 13, 1937, against the defendant, a resident of Mangrul in the Akalkot State, who did not submit to the jurisdiction of the Sholapur Court. The decree was later transferred to the Court of the Nyayadhish, a tribunal of the Akalkot Court, and an application for execution was filed there on June 9, 1945. The defendant opposed this application on the ground that the Sholapur Court was not a " Court of Competent Jurisdiction " within the meaning of section 13 of the Code of Civil Procedure, which lays down the principle that no court has jurisdiction over a non-resident alien. On August 23, 1947, the Nyayadhish Court upheld the objection. The District Judge of Akalkot confirmed that order on June 8, 1948. The plaintiff appealed to the High Court, on January 19, 1951, and a Divisional Bench of this Court referred the matter to the Full Court. In the meantime, the Akalkot State had merged in the Province of Bombay, and it was contended in the appeal that, in view of this merger, the Sholapur Court was no longer a foreign court *qua* the Akalkot Court, and hence that the decree of the Sholapur Court was executable by the Akalkot Court.

Held: that the appeal must be allowed. When the decree of the Sholapur Court had been originally made, the Sholapur

Case No. 30 *Contd.* Court was a foreign court *qua* the Court of Akalkot, and since the defendant did not reside within the jurisdiction of the Sholapur Court, and had not submitted to its jurisdiction, so far as he was concerned the Sholapur Court was not a " Court of Competent Jurisdiction ". Nevertheless, this decree of the Sholapur Court was not a legal nullity, but only subject to a procedural impediment which was removed by the merger of the Akalkot State into the same State as that to which the Sholapur Court belonged. Once this impediment had been removed the decree of the Sholapur Court became executable by the Akalkot Court.

Chagla C.J. said : " The question referred to this full bench is whether a decree passed by a foreign Court against a person who has not submitted to its jurisdiction can ever become enforceable by reason of any subsequent event, [that is] whether *Chunilal Kasturchand* v. *Dundappa,* to the extent that it decides this point, was rightly decided. . . .

" The decree which was passed in this case was passed by the Sholapur Court and it was exercising jurisdiction upon a non-resident foreigner. But the Sholapur Court had the right to exercise jurisdiction upon a non-resident foreigner because s. 20 of the Civil Procedure Code confers such jurisdiction. . . . Therefore, we have clearly this position, that the decree passed by the Sholapur Court was not a nullity. It is equally true that if the defendant, who was a citizen of Akalkot and, therefore, a foreigner *qua* the Sholapur Court, did not submit to the jurisdiction of the Sholapur Court and did not acquiesce in the jurisdiction, then the decree passed by the Sholapur Court could not be enforced when it was transferred for execution to the Akalkot Court. The true view of the decree is not that it was a nullity, but [that] its enforcement or executability was limited to the Sholapur Court, and it could not be executed or enforced in a foreign territory because the defendant had not submitted to the jurisdiction of the Sholapur Court. The principle of private international law which is embodied in s. 13 (*a*) is that a Court will not enforce the judgment of a foreign Court if that judgment is of a Court which is not a competent Court ; and for the purposes of competency in private international law a Court is never competent when it passes a judgment against a non-resident foreigner who has not submitted to its jurisdiction. Therefore, as far as this particular decree was concerned, as the defendant, we are assuming, did not submit to the jurisdiction of the Sholapur Court, *qua* the Akalkot Court, the judgment of the Sholapur Court was a foreign judgment passed by a Court not of competent jurisdiction, and, therefore, the decree could not be executed in the Akalkot Court so long as the Sholapur Court continued to be a foreign Court. But once it is conceded that the decree was not a nullity and [that] it was valid and binding as far as the Sholapur Court was concerned, then there is no difficulty, with respect, in understanding and appreciating the judgment which we have to consider in this full bench, because if the character of the Akalkot Court changes and if the status of the defendant alters because of that fact, then the impediment which was initially there in the decree being enforced in the Akalkot Court disappears and the decree which was unenforceable till that change came about becomes enforceable and executable in the Akalkot Court. This is not in any way violating private international law. Private international law remains the same. But in the circumstances of the case the Sholapur Court no longer being a foreign court *qua* the Akalkot Court, the question of private international law does not arise at all. The decree is then being executed under municipal law, and clearly under municipal law the decree is executable as it has been passed by a court of competent jurisdiction.

" Some difficulty has been caused by reason, with great respect, of the language used by the Privy Council in *Gurdyal Singh* v. *Raja of Faridkote* [see *infra*, Note]. But when one analyses the particular passage on which reliance has been placed, the position is made clear. Their Lordships of the Privy Council stated (p. 238) :

> ' In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by International Law an absolute nullity.'

Emphasis is placed upon the expression used by the Privy Council, *viz.*, that the decree is an absolute nullity. But the Privy Council goes on in the next sentence to qualify what it has said before, and this is what their Lordships say (p. 238) :

> ' He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except (when authorised by special local legislation) in the country of the forum by which it was pronounced.'

Therefore the decree is not an absolute nullity. Something which is an absolute nullity can never be enforced in any part of the world in any circumstances. But the Privy Council itself contemplates that such a decree can be enforced in the forum by which it was passed, provided special local legislation authorises that forum, and, therefore, in one sense the decree is a nullity in a limited sense. The other way of putting the same idea is that the decree is a valid decree, but it is not enforceable in courts other than courts where it was passed by reason of private international law. . . .

" Then there is one other point with which also the judgment has dealt, and that is that a vested right was created in the

Case No. 30 *Contd.* defendant by reason of s. 13 (*a*) of the Code ; a similar provision existed in Akalkot before merger, and that vested right has been taken away and reliance is placed on s. 5 of the Merger Order. That clause, as rightly pointed out by both the Judges [of the Divisional Court], only refers to vested rights which have been affected by repeal of any legislation which was in operation in the merged States. In this case, although the Civil Procedure Code of Akalkot has been repealed, s. 13 (*a*) has taken its place in identical terms and, therefore, whatever prejudice has been caused to the defendant has not been caused by the repeal of any legislation. The prejudice has been caused by an Act of State which altered the status of Akalkot and also altered the status of the defendant and made [the] Akalkot Court a municipal court and made the defendant a citizen, whereas [the] Akalkot Court before was a foreign court and the defendant was a foreigner."

[Report : *I.L.R.* [1952], Bom., 65.]

NOTE.—In *Fazal Ahmed* v. *Abdul Bari* (*Pak. L.R.* (1951), 1 Dacca 375), the Pakistan High Court at Dacca (Civil Appellate, *per* Guha J.), on May 4, 1951, *held* that the decree of a foreign court, not of competent jurisdiction, was, by international law (by which was presumably meant private international law), a nullity. In arriving at this conclusion the Court purported to follow the decision in *Gurdyal Singh* v. *Raja of Faridkote* (1894), 22 Cal. 222 P.C., [1894] A.C. 670, and hence arrived at a view which was the reverse of that reached by the Indian High Court in *Bhagwan Shangkar* v. *Rajarum Bapu.*

Case No. 31

State Succession—Administrator General of Palestine and Administrator General of Israel—Litigation Pending on Change of Sovereignty—Question of Substitution.

FEINGOLD AND OTHERS *v.* ADMINISTRATOR GENERAL.

Israel, Supreme Court sitting as Court of Civil Appeals.
(Dunkelblum, Agranat, Baker.)
July 20, 1951.

THE FACTS.—In 1947 the Administrator General of Palestine commenced proceedings against the appellants for the return of certain moneys, in connection with the winding up of the estate of a deceased person. These proceedings were heard in Court after the termination of the Mandate and the establishment of the State of Israel in May 1948, and on behalf of the defendants it was argued, *inter alia*, that as the proceedings were instituted by the Administrator General of Palestine, the Administrator General of Israel was not competent to continue with them. In June 1949 the District Court dismissed this argument, but the plaintiff was authorized to amend the statement of claim by deleting the word " Palestine ", substituting therefor " Israel ". It was from this Order that the present appeal was brought.

The Administrator General was created by the Administrator General Ordinance No. 37 of 1944 (Palestine Gazette No. 1380, Supplement No. 1 of December 28, 1944, p. 151), and can be compared to the Public Trustee. By s. 4 (2) : " The Administrator General shall be a corporation sole by the name of the Administrator General of Palestine with perpetual succession and an official seal. In all . . . legal proceedings the Administrator General shall sue and be sued by such name. . . ." After the establishment of the State of Israel the Law and Administration Ordinance, 5708–1948, provided, in s. 11, for the continuation in force of existing law (see *Kuk* v. *Minister of Defence*, *Annual Digest*, 1948, Case No. 15). By s. 15 it was provided that " Palestine " wherever appearing in any law, shall henceforth be read as " Israel ".

Held: that the appeal must be allowed and the order of the lower Court reversed. The Administrator General of Israel is not the substitute or successor of the Administrator General of Palestine. The judgment of the Court was delivered by Dunkelblum J. (Agranat J. concurring). He said :

" On behalf of the respondents it was argued that as by s. 4 of the Administrator General Ordinance the Administrator General is a corporation sole, he remains in existence despite the changes that occurred with the establishment of the State. The only change is that in his official name, achieved through s. 15 of the Law and Administration Ordinance. . . . An action commenced during the subsistence of the Mandate can be continued by the present incumbent of the office of Administrator General, just as any other pending action in which a company or corporation is party can proceed. There is no legal importance attaching to the fact that in the room of the Mandatory Administrator General there now stands some other person.

" On the other hand, it was argued on behalf of the appellants that with the establishment of the State the institution, namely, the corporation sole, created by the Ordinance during the time of the Mandate, ceased to exist. True, the Ordinance, like all other Mandatory Ordinances, remained in force. . . . But with the appointment of the new Administrator a new institution was created, which is not a continuation of the corporation existing during the Mandate ; he commenced his existence and his work *de novo*, even though this was on the authority of those same laws which had authorized the functioning of that same corporation during the Mandate. . . .

". . . No authorities were cited for either of these propositions, and I have not succeeded in finding in the facilities at our

Case No. 31 *Contd.* disposal anything to give guidance on this problem. Likewise, we have been given no factual information concerning the relations between the present and the former Administrators General. What has happened to any funds that the latter may have possessed ? Has the Israel Administrator claimed or received them ? Did these funds form an object of discussion between the Government of Israel and those responsible for liquidating the financial problems of the Mandatory Government ? And if there were such discussions, who participated in them, the two Administrators General, or also other persons who dealt with the outstanding financial questions ? We received no information on these topics despite the fact that, at our request, the Attorney-General intervened in these proceedings, and argued in support of the contentions put forward on behalf of the respondent.

" The problem can be defined as follows : To what extent is there a connexion between the corporation sole and the Mandatory Government ? Is this connexion a close one, so that when the Government ceased to exist the corporation also ceased to exist ; or has the corporation an existence of its own which is independent of the existence of the Government ? "

Judge Dunkelblum illustrated his remarks by two " extreme examples ". On the one hand, municipal and local authorities, companies and associations, fall into the type of corporation which have an independent existence of their own and are not dependent upon the existence of the central Government. On the other hand, he quoted an institution such as the English Minister of Health, who, for some purposes, is a corporation sole also. Such an institution has no independent existence and expires when the Government ceases to exist. He then continued :

" What is the position of the Administrator General ? Is he to be likened to a local authority, or to the Minister of Health ? In order to answer this question, we have to examine his authority and the terms of the Ordinance under which he functioned.

" During the Mandate the Administrator General was appointed by the High Commissioner, and his authority extended over the whole country. To a certain extent the Government of Palestine assumed responsibility for his liabilities. If we follow the respondent's arguments to their logical conclusion, it would follow that the establishment of the State of Israel had no effect on the rights and duties of the Administrator General. Only his name has been changed, and the stipulations about the Government's responsibility have remained in full force, subject only to the substitution of the Government of Palestine by the Government of Israel which took upon itself the responsibility expressed in the Ordinance. Such responsibility would not be limited to transactions taking place after the establishment of the State, because the Administrator General is a corporation sole with perpetual succession. Nor would this responsibility be limited to persons who are inhabitants of the State, so that if the Administrator General owed money to a person living in a Palestinian town which is now outside the State, or to a person resident abroad, the Government of Israel would nevertheless be liable to pay such debts within the limits laid down in the Ordinance. Obviously, too, such responsibility would not be limited to transactions originating within what is now the territory of the State.

" I do not know of instances of Government responsibility for the debts of other corporations. It is possible for the Government, in its discretion, to give guarantees for the payment of debts by private individuals or juridical persons. Here the responsibility of the Government derives from an express stipulation of the law, and this can serve as a basis for the view that the Administrator General was part of the Government, but that for reasons of convenience it was found desirable to accord him the status of a separate legal personality, as had been done in England in the case of the Minister of Health, the Postmaster General, and so on.

" No information has been given us as to the status of the Administrator General's staff. Were they officials of the Government or of the Administrator General ? It can be deduced from s. 21 of the Ordinance that the Administrator General himself, and his staff, were paid out of public funds, for that section provides that he is entitled to certain fees, and that those fees shall be paid into the general revenue of Palestine. From this it follows that he retains no funds out of which he could pay his remuneration or the salaries of his staff, and that in fact all his income is part of the income of the Government. On this basis we reach the conclusion that the Administrator General and all his staff were included among the general body of Government officials.

" Section 20 of the Ordinance deals with unclaimed balances of estates in the hands of the Administrator General. Such sums are to be paid by the Administrator General, after certain conditions are fulfilled, into the general revenue of the country. True, the High Commissioner was entitled to distribute such sums, or part of them, to the relatives of the deceased in his absolute discretion, and it may be that such persons have a right to these monies. But from the language of this section it follows that if the High Commissioner does not see fit to make a distribution, then the balance forms part of the general revenue of the Government.

" Section 40 entitles the High Commissioner to make rules for the better carrying out of the purposes and provisions of the Ordinance.

" All these provisions, and also the general tenor of the

Case No. 31 Contd.

Ordinance, show, in my opinion, that the Administrator General was part of the central Government. By law he had certain functions to perform. That was so despite the fact that, possessing a certain legal character as a corporation sole, he was a separate legal entity from the Government.

" There is no doubt that the Mandatory Government, that is to say, the Government of Palestine, ceased to exist without leaving anybody to succeed to its rights and duties. *Shimshon* v. *Attorney-General* [*International Law Reports*, 1950, Case No. 19]. With it, all its departments, whatever their legal form, also ceased to exist.

" My conclusion, then, is that the Administrator General appointed by the Government of Israel is not identical with the Administrator General of the Mandate, with the consequence that the present Administrator General cannot continue with legal transactions commenced before the establishment of this State of Israel. For this reason the appeal should be allowed and the order of the lower Court reversed."

Per Baker J. : " I concur, but wish to add a few remarks : In argument s. 36 of the Ordinance was quoted. In my view this section is instructive in considering the problem with which we are faced. . . . In the first place, this section [which deals with the administration of the estates of certain deceased Government officers by the Administrator General—translator] illustrates the close connexion that existed between the Administrator General and the Government of Palestine, because it deals particularly with the administration of the estates of officials of the Government of Palestine who were not permanent residents of Palestine, but who died in Palestine, and lays down that the Court shall appoint the Administrator General to administer such estates unless good cause is shown. It follows that if the Administrator General of Israel came in the place of the Administrator General of Palestine, he would be entitled to administer such property. But since the establishment of the State of Israel s. 36 has to be read as referring to the property of officials of the Government of Israel, and not to that of officials of the Government of Palestine, in consequence of s. 15 of the Law and Administration Ordinance. . . . Therefore, the Administrator General of Israel cannot administer the property of officials of the Government of Palestine. For this reason the Administrator General of Israel does not come in the place of the Administrator General of Palestine.

" This difficulty does not arise with regard to other sections of the Administrator General Ordinance since the Administrator General of Israel is entitled to administer the property of persons who died in Israel, or who left property in Israel, unless the deceased was a Palestinian citizen. If the deceased was a Palestinian citizen, the Administrator General of Israel cannot administer his property, because he is not entitled to administer the property of Palestinian citizens but the property of Israel citizens, as a result of s. 15 of the Law and Administration Ordinance."

[Reports: *Piskei-Din*, 5 (1951), p. 1180; *Pesakim Elyonim*, 9 (1951), p. 73.]

State Succession—Jurisdiction of Courts—Renunciation of Sovereignty over Territory—Treaty of Peace with Italy, 1947—Libya. **Case No. 32**

FARRUGIA *v.* NUOVA COMP. GEN. AUTOLINEE.

Italy, Court of Cassation. February 17, 1951.

THE FACTS.—The Procurator-General moved for leave to be given to appeal from a decision of the Court of Appeals of Tripoli made after the entry into force of the Treaty of Peace with Italy, whereby Italy renounced sovereignty over Tripoli.

Held: that the motion must be granted. The judicial structure of Tripoli remained Italian and Italy retained jurisdiction in that territory by what may be regarded as implied delegation created by the Treaty. The Court said:

" The first question here is whether this Court can entertain an appeal from a decision of the Court of Appeals of Tripoli which was given after the entry into force of the Treaty of Peace signed at Paris on February 10, 1947. It is raised on motion by the Procurator-General, who has indicated that he is in favour of the giving of leave to appeal. The Court is of the same view, consistently with its decision of August 26, 1950, to the effect that it is competent to entertain appeals against judgments delivered in Eritrea since the Treaty came into force.[1] Judgments of this category are not foreign judgments from the point of view of Italian law, and as a result they are automatically recognised.

" The question raised turns on the meaning of Article 23 of the Treaty, which is worded as follows: ' Italy renounces all right and title to the former Italian possessions in Africa, *i.e.* Libya, Eritrea and Italian Somaliland. Pending their final disposal, the said possessions shall continue under their present administration. The final disposal of these territories shall be determined jointly by the Governments of the Soviet Union, of the United Kingdom, of the United States of America and of France, within one year from the coming into force of the present treaty. . . .' By Annex XI it is further provided that, failing agreement between the Four Powers, the matter should be settled by a Resolution of the General Assembly of the United Nations which those Powers should accept and carry out. This Court, in interpreting the relevant Article of the

---

[1] *Sorkis* v. *Amed*, *International Law Reports*, 1950, Case No. 24.

Case No. 32 *Contd.*

Treaty in the decision referred to, observed that although Italy had thereunder ceased to be sovereign over the territories concerned, the system of judicature in Eritrea did not lose its character as an Italian organisation upon the entry into force of the Treaty. It retained that character not in virtue of sovereignty, which no longer belonged to Italy, but in consequence of a delegation to that country which was implicit in the Treaty, a delegation for the time being pending the definitive disposal of the territories, dependent upon their remaining under their then administration.

" The Court will apply the same interpretation of the Treaty for the determination of the matter now in issue and will not repeat the reasoning of the previous decision. It will merely add that the conclusion therein reached is confirmed by the circumstance that the Province of Libya was, by Royal Decree-Law No. 70 of January 9, 1939, incorporated in the realm ' as an integral portion thereof '. And on this interpretation Italy retains jurisdiction in the territories to which Article 23 applies notwithstanding her renunciation of sovereignty over them. This is quite consistent with the principles of international law, whereunder a State may, pursuant to treaty stipulations, continue to exercise sovereign functions in territory it has ceded, as historical examples show.

" In consequence, the decision of the Court of Appeals of Tripoli is to be regarded as an Italian decision. The Judges who gave it are Italians, being officials of the Ministry of the Colonies and belonging to the Italian judiciary. And Royal Decree No. 2167 of June 27, 1935, providing that Libya should be deemed to be metropolitan territory, which was not annulled when Libya was occupied by the Allied forces, remains in force. Thus appeal lies against the decision according to the normal rules. . . ."

[Report : *Giurisprudenza Compl. Cass. Civile*, 1951, No. 2792.]

State Succession—Judgments of Courts—Judicial Proceedings Begun Prior to Change of Sovereignty.

See Case No. 14 (*G.* v. *G.*).

State Succession—Judgments of Courts—Judicial Proceedings Begun Prior to Change of Sovereignty.

See Case No. 53 (*Ter K.* v. *State of the Netherlands*).

X.—Extradition

State Succession—Effect on Process of Extradition.

See Case No. 105 (*Rex* v. *Abul Hasan*).

PART III

STATE TERRITORY

A—IN GENERAL

I.—Nature of Territorial Sovereignty

Territory—Area in which Law of State Applies—Effect of Resolution of General Assembly of United Nations on—Question of Fact and Question of Law—Certificate of Ministry for Foreign Affairs.

See Case No. 39 (*Attorney-General of Israel* v. *El-Turani*).

II.—Acquisition of Territorial Sovereignty

v.—Conquest and Annexation

Annexation—Recognition of—Non-Recognition by United States of America of Annexation of Lithuania by Soviet Russia—Recognition of Notarization by Agent of an Unrecognized Government—Whether Duly Executed Power of Attorney is Valid Regardless of Nationality of Grantor. **Case No. 33**

In re BRAUNSTEIN'S ESTATE.

United States, Surrogate's Court, New York County.
May 16, 1952.

THE FACTS.—One of two legatees resided in Lithuania, the other in White Russia. The authority of the attorney-in-fact of the legatees was challenged by the executors. In response, a power of attorney purportedly executed by the Lithuanian legatee, notarized in Vilna and authenticated by the chief of the notarial section of the Ministry for Justice of the Lithuanian S.S.R. and by the Ministry of Foreign Affairs of the U.S.S.R., was submitted. A power of attorney executed by a legatee resident in White Russia was also submitted. The United States had refused to recognize the purported annexation of Lithuania by Soviet Russia.

Held: that the power of attorney executed in Lithuania cannot be recognized, but that that executed in White Russia merits recognition. The Court said:

"An analogous fact situation, involving a power-of-attorney

Case No. 33 *Contd.* originating in Latvia, was considered by Mr. Surrogate McGarey in *Matter of Adler's Estate*, 197 Misc. 104, 93 N.Y.S. 2d 416. In the cited case the surrogate ruled that the power-of-attorney before him was not duly executed and that it had not conferred upon the person named as attorney-in-fact any right which entitled him to recognition in the Surrogate's Court. The reasoning of the cited decision is fully applicable here. Inasmuch as the government of the United States has not recognized the incorporation of either Latvia or Lithuania into the Soviet Union, the attempted authentication and certification of the instrument by an official of the Russian Government is not in compliance with the requirements of the statutes of this state.

" The second legatee executed a power-of-attorney in White Russia, an area that was within the territorial limits of the Soviet Union before World War II. The instrument recites that the grantor resided at the place of execution. The authority of Soviet officials to act within the recognized geographical limits of their country is not disputed and consequently the power-of-attorney appears on its face to have been duly executed in a manner entitling it to recognition under the laws of New York. The attack upon the instrument is based upon the suggestion that the grantor may have been deported forcibly to Russia or may be restrained there in a labor camp or prison. Proof of the suggestion, in so far as the legatee is concerned, is wholly lacking. The nationality of the grantor is not material since the attorney-in-fact derives his authority from the instrument and he does not assert any authority as the representative of a government protecting the rights of its national."

[Reports : 202 Misc. 244 ; 114 N.Y.S. 2d 280.]

NOTE.—With respect to a power of attorney executed in the Soviet Zone of Germany see *Matter of Mark*: *New York Law Journal*, July 14, 1952, p. 76.

Annexation—Effect on Nationality—National of Annexed State Abroad at Time of Annexation—Whether He May Opt to Become Stateless—Annexation of Austria by Germany.

See Case No. 59 (*In re Mangold's Patent*).

Annexation—Non-Recognition of—Effect of.

See Case No. 27 (*Latvian State Cargo & Passenger S.S. Line* v. *McGrath, Attorney-General*).

III.—Loss of Territorial Sovereignty

Territory—Loss of—Absence of Final Determination of Status by Treaty of Peace—Treaty of Peace with Italy, 1947—Trieste. **Case No. 34**

C.E.A.T. *v.* SOCIETÀ HUNGARIA.

Italy, Court of Cassation. March 15, 1951.

THE FACTS.—This was an appeal from a decision of the Court of Appeals of Trieste, delivered after the entry into force of the Treaty of Peace with Italy, whereby that country renounced sovereignty over Trieste. The Court raised of its own motion, as a preliminary issue, the question whether it was competent to hear the appeal.

Held: that the Court was competent to hear the appeal, the courts of Trieste retaining their character as Italian judicial organs as a result of an implied delegation effected by the Treaty pending the actual setting up of the Free Territory of Trieste. The Court said: " Before considering the merits the Court must of its own motion consider whether it is competent to entertain an appeal from a decision delivered in the territory of Trieste. The Court has, in its decision of September 22, 1950, held that it may do so where the judgment from which it is sought to appeal was delivered before the entry into force of the Treaty of Peace.[1] Now the question arises with respect to a judgment delivered after that event. It must be answered affirmatively in conformity with the ruling given by the Court in criminal session on September 14, 1950, in *Re Passolunghi e Salamone* [*Foro Italiano*, 1951, II, p. 41].

" The Procurator General in his speech has made reference to the view, largely affected by the writers, that the zone which it is designed shall become the Free Territory of Trieste has ceased to be subject to Italian sovereignty. But for the sake of simplicity, and incidentally agreeably to the Procurator General's argument, that question may be ignored and attention concentrated upon a more relevant aspect of the matter. The considerations which must lead to its being disposed of in the sense indicated may be collected from the Court's earlier decision, dated August 26, 1950, to the effect that it is competent to entertain an appeal against a judgment delivered in Eritrea after the entry into force of the Treaty of Peace.[2]

" In that case the Court decided as it did on the ground that the subject-matter of appellate jurisdiction is the decision of an inferior court. From that it follows logically that the fate which may by chance have overtaken the territory in which the inferior judgment was delivered has no importance in relation

---

[1] *Ferronato e Brocchi* v. *Brocchi*, referred to in *Annual Digest*, 1949, p. 76.

[2] *Sorkis* v. *Amed, International Law Reports*, 1950, Case No. 101.

Case No. 34 *Contd.*

to the question of the competence of the superior court. What is significant is rather the nationality of the inferior decision and of those concerned in it, or even merely of the system of judicature to which the judge whose decision is appealed from belongs.

"There are various reasons why a judgment delivered since the entry into force of the Treaty of Peace in the zone which is to become the Free Territory of Trieste is necessarily a judgment of an organ of the Italian system of judicature. The Treaty provides in the first place (Article 21) for the termination of Italian sovereignty for the purpose of setting up the Free Territory, but stipulates (Article 21 (4)) that the territory concerned shall not be deemed to be ceded territory. But even if the question of sovereignty is not ignored altogether as irrelevant, as has been suggested, it is to be remarked that that termination of Italian sovereignty is not balanced by the simultaneous acquisition of sovereignty on the part of some other subject of international law. For the State of the Free Territory of Trieste was not created immediately. And the Treaty did not, in the second place, provide for the replacement of the existing Italian legal system during the time which should elapse between its entry into force and the coming into existence of the Free Territory. This is to be collected incidentally from the circumstance that it was not provided in Article 6 of the Permanent Statute of the Free Territory that Italian nationals domiciled in the zone on June 10, 1940, should lose their status as such upon the entry into force of the Treaty. This was indeed provided with respect to such nationals as were domiciled in territory ceded by Italy at the relevant date (Article 19). But, as respects persons domiciled in the zone destined to become the Free Territory, it was laid down instead that their national status should change only upon the creation of that entity.

"This apart, the continuing character as Italian organs of the judicial organs earlier set up in the territory concerned follows from the fact that it was contemplated that the legal system of that territory should remain unchanged during the transitional phase. Article 21 (3) of the Treaty in fact provided that as from the date of its entry into force the territory should 'be governed in accordance with an instrument for a provisional régime to be drawn up by the Council of Foreign Ministers and approved by the Security Council'. And Article 1 of that instrument, having premised that the appointment of the Governor should take place as soon as possible, provided that 'pending the assumption of office by the Governor the Free Territory [should] continue to be administered by the Allied military commands within their respective zones of competence'. Upon analysis, these stipulations show that what was intended was a transition from one system of administration (the Italian) to another (that of the Free Territory). But, according to the spirit of the Treaty, the transitional phase was intended to be very brief (*cf.* Article 1 of the instrument for a provisional régime : ‘ The Governor shall assume his functions in the Free Territory as soon as possible ’). It was considered that it would be unduly disruptive of the continuity of communal life and legal relations to provide for two successive changes in the legal order. Accordingly, the legal system in operation anterior to the Treaty was left in operation.

“ As was indicated in the Court’s decision of August 26, 1950, given that the pre-existing legal system remained in operation during the transitional period, the courts continuing to function during that period in the zone which it was designed should become the Free Territory must be treated as Italian courts, pertaining to the Italian system of judicature. Admittedly that zone was at the date the Treaty entered into force under belligerent occupation. It is also clear that the effect of the Treaty was to change the title in virtue of which the Occupant exercised powers therein and rendered the latter no longer dependent on mere military conquest. But because, for the practical reasons outlined, the Treaty did not contemplate any immediate change in the legal system, it neither altered nor limited the powers possessed by the Occupant under customary international law. And the exercise of these does not, as is notorious, involve any destruction or suppression of the legal order of the occupied State or any severance from the latter of its organs, which continue to function in its name (*cf.* Article 43 of the Hague Regulations of 1899 and 1907 whereunder the Occupant is debarred from changing the laws of the occupied country or the structure, personnel and function of the organs of that country).

“ Having regard to this, it may be concluded that the courts established in the area which is to become the Free Territory have not ceased to be Italian courts. This result follows from the factual situation, or from what had been felicitously called the living law ; it follows equally from the provisions of the Treaty and the instrument for a provisional régime which have been examined. As to the former, this is clear enough ; the courts continue to apply Italian law and are staffed by officials who have not ceased to belong to the Italian judicial order. And, as for the treaty stipulations which are relevant, these did not contemplate that there should occur prior to the actual setting up of the Free Territory any change in the legal system or the personnel concerned with its working or the guarantee it represented of the rights of the inhabitants. Articles 14, 15 and 16 of the Permanent Statute laid down that only as from that event should the tribunals to be set up under the law of the Free Territory assume jurisdiction and the constitutional guarantees of the independence of the judiciary, the requirement of the creation of an appellate jurisdiction, and the rules for the appointment of judges operate. And if,

Case No. 34 *Contd.* agreeably to the Treaty (Article 6 of the Permanent Statute), persons domiciled in the territory retain until that event their quality as Italian citizens, they cannot, in virtue of Article 111 (2) of the Constitution, be placed in a position inferior to that of other categories of Italian citizens in regard to the right to appeal against decisions or pronouncements of Italian courts touching their personal liberties."

[Report : *Foro Italiano*, 1951, Part 1, p. 281.]

NOTE.—In *Fontana* v. *S.A.I.A.T.* the Italian Court of Cassation declared itself competent to entertain an appeal from a decision of the Court of Appeals of Trieste which had been given before the entry into force of the Treaty of Peace with Italy : April 27, 1951 ; *Mass. Foro Italiano*, 1951, p. 68. A like decision was reached in *Az. Comm. Ital. Carboni* v. *Meiorini* : June 16, 1951 ; ibid., p. 370.[1]

State Territory—Loss of—Munich Pact of 1938—Czechoslovak Cession of Sudetenland.

See Case No. 63 (*Nederlands Beheers-Instituut* v. *Nimwegen and Männer*).

Territory—Loss of—Renunciation of Sovereignty over Territory Pending Final Settlement—Treaty of Peace with Italy, 1947—Libya.

See Case No. 32 (*Farrugia* v. *Nuova Comp. Gen. Autolinee*).

B—PARTS OF STATE TERRITORY

II.—Rivers

iii.—International Rivers

(a) THE PRINCIPLE OF FREEDOM OF NAVIGATION ON INTERNATIONAL RIVERS

Case No. 35 **International Rivers—Navigation on the Rhine—Convention of Mannheim, 1868—Obligation of State of Netherlands to Keep Channel in Good Order—Extent of Obligation.**

SLIEDRECHT INSURANCE COMPANY AND ENGELAAR *v.* STATE OF THE NETHERLANDS.

Holland, District Court of The Hague.
March 1, 1950, and *June* 13, 1951.

THE FACTS.—On November 15, 1947, the M.V. *Sint-Theresia*, belonging to the plaintiff Engelaar, while on her way from Germany to Tiel (Holland) with a load of gravel and while still in the channel of the Rhine, was turning into the harbour of Nijmegen, on the River Waal (one of the mouths of the

---

[1] See also *Annual Digest*, 1949, Case No. 28.

Rhine), when it struck a solid object below the surface of the water, sustaining damage. The object was later found to be a caisson used in 1944 by British troops as an anchor for one of their pontoon bridges. The owner of the vessel and his insurers sued the State of the Netherlands for damages, on the grounds (*a*) that the river was under the administrative control and upkeep of that State and that the obligation to keep the river in a proper condition implied the obligation to ensure that there was nothing in the river which might be a danger to navigation during normal use of the waterway, and (*b*) that the State had neglected to comply with the obligation, imposed upon it by an international treaty, namely, the Revised Convention of Mannheim of 1868, to keep the channel in good order.[1]

Held: that the plaintiffs must fail under head (*a*) but, subject to further evidence, might succeed under head (*b*). The Court said with regard to (*a*): " The State had under Netherlands domestic law no such obligation for the Waal as was contended; it had assumed the task of keeping this naturally navigable river permanently navigable simply in the exercise of its powers as a public authority, but without this entailing any specific legal obligation towards those using the river. As regards (*b*), however, the international engagement entered into in 1868 created an obligation under civil law on the part of the State towards private users of the river, such as the owner of the *Sint-Theresia*. The State was therefore bound, as it always had been, to ensure the bringing and keeping of the channel of the Rhine—which under Article 1 of the Convention of Mannheim included the Waal—in good order, but without any obligation to meet further special demands over and above what it had already done in this respect in the past. This engagement must moreover be construed and executed in good faith. Thus the State may be required to do everything possible to make and to keep the channel navigable. It cannot, however, be required to do the impossible, namely, to prevent the flow of the river from hampering, possibly even from temporarily preventing, its navigability."

The State of the Netherlands was ordered by the Court to prove that all possible care had been taken to prevent damage to river traffic. In subsequent proceedings the Court was satisfied that the State had in fact done all that it reasonably could do to prevent such damage. The claim was in the event dismissed.

[Reports: *N.J.*, 1952, No. 238, and *ibid.*, 1953, No. 26.]

---

[1] Article 28 of the Convention provides as follows: " Les Hautes Parties Contractantes s'engagent, comme pour le passé, chacune pour l'étendue de son territoire, à mettre et à maintenir en bon état les chemins de halage existants, ainsi que le chenal du Rhin. . . ."

III.—Territorial Waters

i.—Nature of the Maritime Belt

Territorial Waters—In General—Whether Part of State Territory—Subsoil of Territorial Waters.

See Case No. 37 (*Petroleum Development Ltd.* v. *Sheikh of Abu Dhabi*).

ii.—Breadth and Delimitation of the Maritime Belt. Base Lines. Islands. Subsoil of Territorial Waters

Case No. 36 **Territorial Waters—Measurement of—Base Line—Sinuosities of the Coast—General Direction of the Coast—The Nature of the Coast and the Determination of the Base Line—Bays—Historic Waters—Ten-Mile Rule—International Character of Delimitation of Territorial Waters—Criteria of Delimitation—Evidence of Existing Practice—Application of the System of Straight Lines—Acquiescence of States Affected by Unilateral Measures of Delimitation—Application of the System of Straight Lines to Specific Areas.**

ANGLO-NORWEGIAN FISHERIES CASE.

International Court of Justice.

(Basdevant, President; Guerrero, Alvarez, Hackworth, Winiarski, Zoričić, De Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Read, Hsu Mo, Judges.)

Judgment of December 18, 1951.

THE FACTS (as stated by the Court).—" On September 28th, 1949, the Government of the United Kingdom of Great Britain and Northern Ireland filed in the Registry an Application instituting proceedings before the Court against the Kingdom of Norway, the subject of the proceedings being the validity or otherwise, under international law, of the lines of delimitation of the Norwegian fisheries zone laid down by the Royal Decree of July 12th, 1935, as amended by a Decree of December 10th, 1937, for that part of Norway which is situated northward of 66° 28.8′ (or 66° 28′ 48″) N. latitude. The Application refers to the Declarations by which the United Kingdom and Norway have accepted the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute.

" This Application asked the Court

' (*a*) to declare the principles of international law to be applied in defining the base-lines, by reference to which the Norwegian Government is entitled to delimit a fisheries zone, extending to seaward 4 sea miles from those lines and exclusively reserved for its own nationals, and to define the said base-lines in so far as it appears necessary, in the light of the arguments of the Parties, in order to avoid further legal differences between them ;

'(*b*) to award damages to the Government of the United Kingdom in respect of all interferences by the Norwegian authorities with British fishing vessels outside the zone which, in accordance with the Court's decision under (*a*), the Norwegian Government is entitled to reserve for its nationals.'

" The historical facts laid before the Court establish that as the result of complaints from the King of Denmark and of Norway, at the beginning of the seventeenth century, British fishermen refrained from fishing in Norwegian coastal waters for a long period, from 1616–1618 until 1906.

" In 1906 a few British fishing vessels appeared off the coasts of Eastern Finnmark. From 1908 onwards they returned in greater numbers. These were trawlers equipped with improved and powerful gear. The local population became perturbed, and measures were taken by the Norwegian Government with a view to specifying the limits within which fishing was prohibited to foreigners.

" The first incident occurred in 1911 when a British trawler was seized and condemned for having violated these measures. Negotiations ensued between the two Governments. These were interrupted by the war in 1914. From 1922 onwards incidents recurred. Further conversations were initiated in 1924. In 1932, British trawlers, extending the range of their activities, appeared in the sectors off the Norwegian coast west of the North Cape, and the number of warnings and arrests increased. On July 27th, 1933, the United Kingdom Government sent a memorandum to the Norwegian Government complaining that in delimiting the territorial sea the Norwegian authorities had made use of unjustifiable base-lines. On July 12th, 1935, a Norwegian Royal Decree was enacted delimiting the Norwegian fisheries zone north of 66° 28.8′ North latitude.

" The United Kingdom made urgent representations in Oslo in the course of which the question of referring the dispute to the Permanent Court of International Justice was raised. Pending the result of the negotiations, the Norwegian Government made it known that Norwegian fishery patrol vessels would deal leniently with foreign vessels fishing a certain distance within the fishing limits. In 1948, since no agreement had been reached, the Norwegian Government abandoned its lenient enforcement of the 1935 Decree ; incidents then

Case No. 36 *Contd.*

became more and more frequent. A considerable number of British trawlers were arrested and condemned. It was then that the United Kingdom Government instituted the present proceedings.

" The Norwegian Royal Decree of July 12th, 1935, concerning the delimitation of the Norwegian fisheries zone sets out in the preamble the considerations on which its provisions are based. In this connection it refers to ' well-established national titles of right ', ' the geographical conditions prevailing on the Norwegian coasts ', ' the safeguard of the vital interests of the inhabitants of the northernmost parts of the country ' ; it further relies on the Royal Decrees of February 22nd, 1812, October 16th, 1869, January 5th, 1881, and September 9th, 1889.

" The Decree provides that ' lines of delimitation towards the high sea of the Norwegian fisheries zone as regards that part of Norway which is situated northward of 66° 28.8′ North latitude . . . shall run parallel with straight base-lines drawn between fixed points on the mainland, on islands or rocks, starting from the final point of the boundary line of the Realm in the easternmost part of the Varangerfjord and going as far as Træna in the County of Nordland '. An appended schedule indicates the fixed points between which the base-lines are drawn.

" The subject of the dispute is clearly indicated under point 8 of the Application instituting proceedings : ' The subject of the dispute is the validity or otherwise under international law of the lines of delimitation of the Norwegian fisheries zone laid down by the Royal Decree of 1935 for that part of Norway which is situated northward of 66° 28.8′ North latitude '. And further on : ' . . . the question at issue between the two Governments is whether the lines prescribed by the Royal Decree of 1935 as the base-lines for the delimitation of the fisheries zone have or have not been drawn in accordance with the applicable rules of international law '.

" Although the Decree of July 12th, 1935, refers to the Norwegian fisheries zone and does not specifically mention the territorial sea, there can be no doubt that the zone delimited by this Decree is none other than the sea area which Norway considers to be her territorial sea. That is how the Parties argued the question and that is the way in which they submitted it to the Court for decision."

Held (by ten votes to two) : that the method employed for the delimitation of the fisheries zone by the Royal Norwegian Decree of July 12, 1935, was not contrary to international law.

Judge Hackworth declared that he concurred in the operative part of the Judgment for the reason that he considered that the

Norwegian Government had proved the existence of an historic title to the disputed areas of water.

Judges Alvarez and Hsu Mo appended to the Judgment of the Court statements of their Separate Opinions.

Judges Sir Arnold McNair and Read appended to the Judgment statements of their Dissenting Opinions.

The Court said: "The claim of the United Kingdom Government is founded on what it regards as the general international law applicable to the delimitation of the Norwegian fisheries zone.

"The Norwegian Government does not deny that there exist rules of international law to which this delimitation must conform. It contends that the propositions formulated by the United Kingdom Government in its 'Conclusions' do not possess the character attributed to them by that Government. It further relies on its own system of delimitation which it asserts to be in every respect in conformity with the requirements of international law.

"The Court will examine in turn these various aspects of the claim of the United Kingdom and of the defence of the Norwegian Government.

[I. *The Nature of the Coast and the Determination of the Base-Line.*]

"The coastal zone concerned in the dispute is of considerable length. It lies north of latitude 66° 28.8′ N., that is to say, north of the Arctic Circle, and it includes the coast of the mainland of Norway and all the islands, islets, rocks, and reefs, known by the name of the 'skjærgaard' (literally, rock rampart), together with all Norwegian internal and territorial waters. The coast of the mainland, which, without taking any account of fjords, bays and minor indentations, is over 1,500 kilometres in length, is of a very distinctive configuration. Very broken along its whole length, it constantly opens out into indentations often penetrating for great distances inland: the Porsangerfjord, for instance, penetrates 75 sea miles inland. To the west, the land configuration stretches out into the sea: the large and small islands, mountainous in character, the islets, rocks and reefs, some always above water, others emerging only at low tide, are in truth but an extension of the Norwegian mainland. The number of insular formations, large and small, which make up the 'skjærgaard', is estimated by the Norwegian Government to be one hundred and twenty thousand. From the southern extremity of the disputed area to the North Cape, the 'skjærgaard' lies along the whole of the coast of the mainland; east of the North Cape, the 'skjærgaard' ends, but the coast line continues to be broken by large and deeply indented fjords.

"Within the 'skjærgaard', almost every island has its

Case No. 36 *Contd.*

large and its small bays ; countless arms of the sea, straits, channels and mere waterways serve as a means of communication for the local population which inhabits the islands as it does the mainland. The coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea. What matters, what really constitutes the Norwegian coast line, is the outer line of the ' skjærgaard '.

" The whole of this region is mountainous. The North Cape, a sheer rock little more than 300 metres high, can be seen from a considerable distance ; there are other summits rising to over a thousand metres, so that the Norwegian coast, mainland and ' skjærgaard ', is visible from far off.

" Along the coast are situated comparatively shallow banks, veritable under-water terraces which constitute fishing grounds where fish are particularly abundant ; these grounds were known to Norwegian fishermen and exploited by them from time immemorial. Since these banks lay within the range of vision, the most desirable fishing grounds were always located and identified by means of the method of alignments (' *meds* '), at points where two lines drawn between points selected on the coast or on islands intersected.

" In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing.

" Such are the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law.

" The Parties being in agreement on the figure of 4 miles for the breadth of the territorial sea, the problem which arises is from what base-line this breadth is to be reckoned. The Conclusions of the United Kingdom are explicit on this point : the base-line must be low-water mark on permanently dry land which is a part of Norwegian territory, or the proper closing line of Norwegian internal waters.

" The Court has no difficulty in finding that, for the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has generally been adopted in the practice of States. This criterion is the most favourable to the coastal State and clearly shows the character of territorial waters as appurtenant to the land territory. The Court notes that the Parties agree as to this criterion, but that they differ as to its application.

" The Parties also agree that in the case of a low-tide elevation (drying rock) the outer edge at low water of this low-tide elevation may be taken into account as a base-point for calculating the breadth of the territorial sea. The Conclusions of the United Kingdom Government add a condition which is not admitted by Norway, namely, that, in order to be taken into account, a drying rock must be situated within 4 miles of permanently dry land. However, the Court does not consider it necessary to deal with this question, inasmuch as Norway has succeeded in proving, after both Parties had given their interpretation of the charts, that in fact none of the drying rocks used by her as base points is more than 4 miles from permanently dry land.

" The Court finds itself obliged to decide whether the relevant low-water mark is that of the mainland or of the ' skjærgaard '. Since the mainland is bordered in its western sector by the ' skjærgaard ', which constitutes a whole with the mainland, it is the outer line of the ' skjærgaard ' which must be taken into account in delimiting the belt of Norwegian territorial waters. This solution is dictated by geographic realities.

" Three methods have been contemplated to effect the application of the low-water mark rule. The simplest would appear to be the method of the *tracé parallèle*, which consists of drawing the outer limit of the belt of territorial waters by following the coast in all its sinuosities. This method may be applied without difficulty to an ordinary coast, which is not too broken. Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the ' skjærgaard ' along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and can only be determined by means of a geometric construction. In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities ; nor can one speak of exceptions when contemplating so rugged a coast in detail. Such a coast, viewed as a whole, calls for the application of a different method. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast. The rule would disappear under the exceptions.

" It is true that the experts of the Second Sub-Committee of the Second Committee of the 1930 Conference for the codification of international law formulated the low-water mark rule somewhat strictly (' following all the sinuosities of the coast '). But they were at the same time obliged to admit many exceptions relating to bays, islands near the coast, groups of islands. In the present case this method of the *tracé parallèle*, which was invoked against Norway in the Memorial, was abandoned in the written Reply, and later in the oral argument of the Agent of the United Kingdom Government. Consequently, it is no longer relevant to the case. ' On the other hand', it is said in the Reply, ' the *courbe tangente*—or, in English, " envelopes of arcs of circles "—method is the method which the United Kingdom considers to be the correct one.'

Case No. 36 *Contd.*

" The arcs of circles method, which is constantly used for determining the position of a point or object at sea, is a new technique in so far as it is a method for delimiting the territorial sea. This technique was proposed by the United States delegation at the 1930 Conference for the codification of international law. Its purpose is to secure the application of the principle that the belt of territorial waters must follow the line of the coast. It is not obligatory by law, as was admitted by Counsel for the United Kingdom Government in his oral reply. In these circumstances, and although certain of the Conclusions of the United Kingdom are founded on the application of the arcs of circles method, the Court considers that it need not deal with these Conclusions in so far as they are based upon this method.

" The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea ; these criteria will be elucidated later. The Court will confine itself at this stage to noting that, in order to apply this principle, several States have deemed it necessary to follow the straight base-lines method and that they have not encountered objections of principle by other States. This method consists of selecting appropriate points on the low-water mark and drawing straight lines between them. This has been done, not only in the case of well-defined bays, but also in cases of minor curvatures of the coast line where it was solely a question of giving a simpler form to the belt of territorial waters.

[II. *The Base-Line in Relation to Bays. The Ten-Mile Rule.*]

" It has been contended, on behalf of the United Kingdom, that Norway may draw straight lines only across bays. The Court is unable to share this view. If the belt of territorial waters must follow the outer line of the ' skjærgaard ', and if the method of straight base-lines must be admitted in certain cases, there is no valid reason to draw them only across bays, as in Eastern Finnmark, and not also to draw them between islands, islets and rocks, across the sea areas separating them, even when such areas do not fall within the conception of a bay. It is sufficient that they should be situated between the island formations of the ' skjærgaard ', *inter fauces terrarum.*

" The United Kingdom Government concedes that straight lines, regardless of their length, may be used only subject to the conditions set out in point 5 of its Conclusions, as follows :

> ' Norway is entitled to claim as Norwegian internal waters, on historic grounds, all fjords and sunds which fall within the conception of a bay as defined in international law (see No. (6) below), whether the proper closing line of the indentation is more or less than 10 sea miles long.'

" A preliminary remark must be made in respect of this point.

" In the opinion of the United Kingdom Government, Norway is entitled, on historic grounds, to claim as internal waters all fjords and sunds which have the character of a bay. She is also entitled on historic grounds to claim as Norwegian territorial waters all the waters of the fjords and sunds which have the character of legal straits (Conclusions, point 9), and, either as internal or as territorial waters, the areas of water lying between the island fringe and the mainland (point 11 and second alternative Conclusion II).

" By ' historic waters ' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title. The United Kingdom Government refers to the notion of historic titles both in respect of territorial waters and internal waters, considering such titles, in both cases, as derogations from general international law. In its opinion Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possessio longi temporis*, with the result that her jurisdiction over these waters must now be recognized although it constitutes a derogation from the rules in force. Norwegian sovereignty over these waters would constitute an exception, historic titles justifying situations which would otherwise be in conflict with international law.

" As has been said, the United Kingdom Government concedes that Norway is entitled to claim as internal waters all the waters of fjords and sunds which fall within the conception of a bay as defined in international law whether the closing line of the indentation is more or less than ten sea miles long. But the United Kingdom Government concedes this only on the basis of historic title ; it must therefore be taken that that Government has not abandoned its contention that the ten-mile rule is to be regarded as a rule of international law.

" In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.

" In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.

" The Court now comes to the question of the length of the base-lines drawn across the waters lying between the various formations of the ' skjærgaard '. Basing itself on the analogy

Case No. 36 *Contd.*

with the alleged general rule of ten miles relating to bays, the United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles.

" In this connection, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals.

" Furthermore, apart from any question of limiting the lines to ten miles, it may be that several lines can be envisaged. In such cases the coastal State would seem to be in the best position to appraise the local conditions dictating the selection.

" Consequently, the Court is unable to share the view of the United Kingdom Government, that ' Norway, in the matter of base-lines, now claims recognition of an exceptional system '. As will be shown later, all that the Court can see therein is the application of general international law to a specific case.

" The Conclusions of the United Kingdom, points 5 and 9 to 11, refer to waters situated between the base-lines and the Norwegian mainland. The Court is asked to hold that on historic grounds these waters belong to Norway, but that they are divided into two categories : territorial and internal waters, in accordance with two criteria which the Conclusions regard as well founded in international law, the waters falling within the conception of a bay being deemed to be internal waters, and those having the character of legal straits being deemed to be territorial waters.

" As has been conceded by the United Kingdom, the ' skjærgaard ' constitutes a whole with the Norwegian mainland ; the waters between the base-lines of the belt of territorial waters and the mainland are internal waters. However, according to the argument of the United Kingdom a portion of these waters constitutes territorial waters. These are *inter alia* the waters followed by the navigational route known as the Indreleia. It is contended that since these waters have this character, certain consequences arise with regard to the determination of the territorial waters at the end of this water-bay considered as a maritime strait.

" The Court is bound to observe that the Indreleia is not a strait at all, but rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway. In these circumstances the Court is unable to accept the view that the Indreleia, for the purposes of the present case, has a status different from that of the other waters included in the ' skjærgaard '.

" Thus the Court, confining itself for the moment to the Conclusions of the United Kingdom, finds that the Norwegian

Government in fixing the base-lines for the delimitation of the Norwegian fisheries zone by the 1935 Decree has not violated international law.

[III. *The International Character of the Delimitation of Sea Areas.*]

" It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law. The delimitation of sea areas has always an international aspect ; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.

" In this connection, certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question.

" Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts. It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.

" Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.

" Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors : that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.

" Norway puts forward the 1935 Decree as the application of a traditional system of delimitation, a system which she

Case No. 36 *Contd.* claims to be in complete conformity with international law. The Norwegian Government has referred in this connection to an historic title, the meaning of which was made clear by Counsel for Norway at the sitting on October 12th, 1951: 'The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of sea which the general law would deny; it invokes history, together with other factors, to justify the way in which it applies the general law'. This conception of an historic title is in consonance with the Norwegian Government's understanding of the general rules of international law. In its view, these rules of international law take into account the diversity of facts and, therefore, concede that the drawing of base-lines must be adapted to the special conditions obtaining in different regions. In its view, the system of delimitation applied in 1935, a system characterized by the use of straight lines, does not therefore infringe the general law; it is an adaptation rendered necessary by local conditions.

[IV. *The Application of the System of Straight Lines.*]

"The Court must ascertain precisely what this alleged system of delimitation consists of, what is its effect in law as against the United Kingdom, and whether it was applied by the 1935 Decree in a manner which conformed to international law.

"It is common ground between the Parties that on the question of the existence of a Norwegian system, the Royal Decree of February 22nd, 1812, is of cardinal importance. This Decree is in the following terms: 'We wish to lay down as a rule that, in all cases when there is a question of determining the limit of our territorial sovereignty at sea, that limit shall be reckoned at the distance of one ordinary sea league from the island or islet farthest from the mainland, not covered by the sea; of which all proper authorities shall be informed by rescript'.

"This text does not clearly indicate how the base-lines between the islands or islets farthest from the mainland were to be drawn. In particular, it does not say in express terms that the lines must take the form of straight lines drawn between these points. But it may be noted that it was in this way that the 1812 Decree was invariably construed in Norway in the course of the 19th and 20th centuries.

"The Decree of October 16th, 1869, relating to the delimitation of Sunnmöre, and the Statement of Reasons for this Decree, are particularly revealing as to the traditional Norwegian conception and the Norwegian construction of the Decree of 1812. It was by reference to the 1812 Decree, and specifically relying upon 'the conception' adopted by that Decree, that the Ministry of the Interior justified the drawing of a straight line 26 miles in length between the two outermost points of the 'skjærgaard'. The Decree of September 9th, 1889, relating to the delimitation of Romsdal and Nordmöre, applied the same method, drawing four straight lines, respectively 14.7 miles, 7 miles, 23.6 miles and 11.6 miles in length.

"The 1812 Decree was similarly construed by the Territorial Waters Boundary Commission (Report of February 29th, 1912, pp. 48–49), as it was in the Memorandum of January 3rd, 1929, sent by the Norwegian Government to the Secretary-General of the League of Nations, in which it was said: 'The direction laid down by this Decree should be interpreted in the sense that the starting-point for calculating the breadth of the territorial waters should be a line drawn along the "skjærgaard" between the furthest rocks and, where there is no "skjærgaard", between the extreme points'. The judgment delivered by the Norwegian Supreme Court in 1934, in the *St. Just* case, provided final authority for this interpretation. This conception accords with the geographical characteristics of the Norwegian coast and is not contrary to the principles of international law.

"It should, however, be pointed out that whereas the 1812 Decree designated as base-points 'the island or islet farthest from the mainland not covered by the sea', Norwegian governmental practice subsequently interpreted this provision as meaning that the limit was to be reckoned from the outermost islands and islets 'not continuously covered by the sea'.

"The 1812 Decree, although quite general in its terms, had as its immediate object the fixing of the limit applicable for the purposes of maritime neutrality. However, as soon as the Norwegian Government found itself impelled by circumstances to delimit its fisheries zone, it regarded that Decree as laying down principles to be applied for purposes other than neutrality. The Statements of Reasons of October 1st, 1869, December 20th, 1880, and May 24th, 1889, are conclusive on this point. They also show that the delimitation effected in 1869 and in 1889 constituted a reasoned application of a definite system applicable to the whole of the Norwegian coast line, and was not merely legislation of local interest called for by any special requirements. The following passage from the Statement of Reasons of the 1869 Decree may in particular be referred to: 'My Ministry assumes that the general rule mentioned above [namely, the four-mile rule], which is recognized by international law for the determination of the extent of a country's territorial waters, must be applied here in such a way that the sea area inside a line drawn parallel to a straight line between the two outermost islands or rocks not covered by the sea, Svinöy to the south and Storholmen to the north, and one geographical league north-west of that straight line, should be considered Norwegian maritime territory'.

Case No. 36 *Contd.*

" The 1869 Statement of Reasons brings out all the elements which go to make up what the Norwegian Government describes as its traditional system of delimitation : base-points provided by the islands or islets farthest from the mainland, the use of straight lines joining up these points, the lack of any maximum length for such lines. The judgment of the Norwegian Supreme Court in the *St. Just* case upheld this interpretation and added that the 1812 Decree had never been understood or applied ' in such a way as to make the boundary follow the sinuosities of the coast or to cause its position to be determined by means of circles drawn round the points of the Skjærgaard or of the mainland furthest out to sea—a method which it would be very difficult to adopt or to enforce in practice, having regard to the special configuration of this coast '. Finally, it is established that, according to the Norwegian system, the base-lines must follow the general direction of the coast, which is in conformity with international law.

" Equally significant in this connection is the correspondence which passed between Norway and France between 1869–1870. On December 21st, 1869, only two months after the promulgation of the Decree of October 16th relating to the delimitation of Sunnmöre, the French Government asked the Norwegian Government for an explanation of this enactment. It did so basing itself upon ' the principles of international law '. In a second Note dated December 30th of the same year, it pointed out that the distance between the base-points was greater than 10 sea miles, and that the line joining up these points should have been a broken line following the configuration of the coast. In a Note of February 8th, 1870, the Ministry for Foreign Affairs, also dealing with the question from the point of view of international law, replied as follows :

' By the same Note of December 30th, Your Excellency drew my attention to the fixing of the fishery limit in the Sunnmöre Archipelago by a straight line instead of a broken line. According to the view held by your Government, as the distance between the islets of Svinöy and Storholmen is more than 10 sea miles, the fishery limit between these two points should have been a broken line following the configuration of the coast line and nearer to it than the present limit. In spite of the adoption in some treaties of the quite arbitrary distance of 10 sea miles, this distance would not appear to me to have acquired the force of an international law. Still less would it appear to have any foundation in reality ; one bay, by reason of the varying formations of the coast and sea-bed, may have an entirely different character from that of another bay of the same width. It seems to me rather that local conditions and considerations of what is practicable and equitable should be decisive in specific cases. The configuration of our coasts in no way resembles that of the coasts of other European countries, and that fact alone makes the adoption of any absolute rule of universal application impossible in this case.

'I venture to claim that all these reasons militate in favour of the line laid down by the Decree of October 16th. A broken line, conforming closely to the indentations of the coast line between Svinöy and Storholmen, would have resulted in a boundary so involved and so indistinct that it would have been impossible to exercise any supervision over it. . . .'

"Language of this kind can only be construed as the considered expression of a legal conception regarded by the Norwegian Government as compatible with international law. And indeed, the French Government did not pursue the matter. In a Note of July 27th, 1870, it is said that, while maintaining its standpoint with regard to principle, it was prepared to accept the delimitation laid down by the Decree of October 16th, 1869, as resting upon 'a practical study of the configuration of the coast line and of the conditions of the inhabitants'.

"The Court, having thus established the existence and the constituent elements of the Norwegian system of delimitation, further finds that this system was consistently applied by Norwegian authorities and that it encountered no opposition on the part of other States.

"The United Kingdom Government has however sought to show that the Norwegian Government has not consistently followed the principles of delimitation which, it claims, form its system, and that it has admitted by implication that some other method would be necessary to comply with international law. The documents to which the Agent of the Government of the United Kingdom principally referred at the hearing on October 20th, 1951, relate to the period between 1906 and 1908, the period in which British trawlers made their first appearance off the Norwegian coast, and which, therefore, merits particular attention.

"The United Kingdom Government pointed out that the law of June 2nd, 1906, which prohibited fishing by foreigners, merely forbade fishing in 'Norwegian territorial waters', and it deduced from the very general character of this reference that no definite system existed. The Court is unable to accept this interpretation, as the object of the law was to renew the prohibition against fishing and not to undertake a precise delimitation of the territorial sea.

"The second document relied upon by the United Kingdom Government is a letter dated March 24th, 1908, from the Minister for Foreign Affairs to the Minister of National Defence. The United Kingdom Government thought that this letter indicated an adherence by Norway to the low-water mark rule contrary to the present Norwegian position. This interpretation cannot be accepted; it rests upon a confusion between the low-water mark rule as understood by the United Kingdom, which requires that all the sinuosities of the coast line at low tide should be followed, and the general practice of selecting the low-tide mark rather than that of the high tide for measuring the extent of the territorial sea.

" The third document referred to is a Note, dated November 11th, 1908, from the Norwegian Minister for Foreign Affairs to the French Chargé d'Affaires at Christiania, in reply to a request for information as to whether Norway had modified the limits of her territorial waters. In it the Minister said : ' Interpreting Norwegian regulations in this matter, whilst at the same time conforming to the general rule of the Law of Nations, this Ministry gave its opinion that the distance from the coast should be measured from the low-water mark and that every islet not continuously covered by the sea should be reckoned as a starting-point '. The United Kingdom Government argued that by the reference to ' the general rule of the Law of Nations ', instead of to its own system of delimitation entailing the use of straight lines, and, furthermore, by its statement that ' every islet not continuously covered by the sea should be reckoned as a starting-point ', the Norwegian Government had completely departed from what it to-day describes as its system.

" It must be remembered that the request for information to which the Norwegian Government was replying related not to the use of straight lines, but to the breadth of Norwegian territorial waters. The point of the Norwegian Government's reply was that there had been no modification in the Norwegian legislation. Moreover, it is impossible to rely upon a few words taken from a single note to draw the conclusion that the Norwegian Government had abandoned a position which its earlier official documents had clearly indicated.

" The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court.

[V. *Acquiescence by Foreign States.*]

" In the light of these considerations, and in the absence of convincing evidence to the contrary, the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose.

" From the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States.

" Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation

Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States. Since, moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States.

" The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it. One cannot indeed consider as raising objections the discussions to which the *Lord Roberts* incident gave rise in 1911, for the controversy which arose in this connection related to two questions, that of the four-mile limit, and that of Norwegian sovereignty over the Varangerfjord, both of which were unconnected with the position of base-lines. It would appear that it was only in its Memorandum of July 27th, 1933, that the United Kingdom made a formal and definite protest on this point.

" The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government. Nor, knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system. The same observation applies *a fortiori* to the Decree of 1889 relating to the delimitation of Romsdal and Nordmöre which must have appeared to the United Kingdom as a reiterated manifestation of the Norwegian practice.

" Norway's attitude with regard to the North Sea Fisheries (Police) Convention of 1882 is a further fact which must at once have attracted the attention of Great Britain. There is scarcely any fisheries convention of greater importance to the coastal States of the North Sea or of greater interest to Great Britain. Norway's refusal to adhere to this Convention clearly raised the question of the delimitation of her maritime domain, especially with regard to bays, the question of their delimitation by means of straight lines of which Norway challenged the maximum length adopted in the Convention. Having regard to the fact that a few years before, the delimitation of Sunnmöre by the 1869 Decree had been presented as an application of the Norwegian system, one cannot avoid the conclusion that, from

Case No. 36 *Contd.*

that time on, all the elements of the problem of Norwegian coastal waters had been clearly stated. The steps subsequently taken by Great Britain to secure Norway's adherence to the Convention clearly show that she was aware of and interested in the question.

" The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.

" The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.

" The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.

[VI. *Application of the System of Straight Lines to Specific Areas.*]

" The question now arises whether the Decree of July 12th, 1935, which in its preamble is expressed to be an application of this method, conforms to it in its drawing of the base-lines, or whether, at certain points, it departs from this method to any considerable extent.

" The schedule appended to the Decree of July 12th, 1935, indicates the fixed points between which the straight base-lines are drawn. The Court notes that these lines were the result of a careful study initiated by the Norwegian authorities as far back as 1911. The base-lines recommended by the Foreign Affairs Committee of the Storting for the delimitation of the fisheries zone and adopted and made public for the first time by the Decree of July 12th, 1935, are the same as those which the so-called Territorial Waters Boundary Commissions, successively appointed on June 29th, 1911, and July 12th, 1912, had drawn in 1912 for Finnmark and in 1913 for Nordland and Troms. The Court further notes that the 1911 and 1912 Commissions advocated these lines and in so doing constantly referred, as the 1935 Decree itself did, to the traditional system of delimitation adopted by earlier acts and more particularly by the Decrees of 1812, 1869 and 1889.

" In the absence of convincing evidence to the contrary, the Court cannot readily find that the lines adopted in these circumstances by the 1935 Decree are not in accordance with the traditional Norwegian system. However, a purely factual difference arose between the Parties concerning the three following base-points: No. 21 (Vesterfallet i Gaasan), No. 27 (Tokkebaaen) and No. 39 (Nordböen). This difference is now devoid of object. A telegram dated October 19th, 1951, from the Hydrographic Service of Norway to the Agent of the Norwegian Government, which was communicated to the Agent of the United Kingdom Government, has confirmed that these three points are rocks which are not continuously submerged. Since this assertion has not been further disputed by the United Kingdom Government, it may be considered that the use of these rocks as base-points is in conformity with the traditional Norwegian system.

" Finally, it has been contended by the United Kingdom Government that certain, at least, of the base-lines adopted by the Decree are, irrespective of whether or not they conform to the Norwegian system, contrary to the principles stated above by the Court as governing any delimitation of the territorial sea. The Court will consider whether, from the point of view of these principles, certain of the base-lines which have been criticized in some detail really are without justification.

" The Norwegian Government admits that the base-lines must be drawn in such a way as to respect the general direction of the coast and that they must be drawn in a reasonable manner. The United Kingdom Government contends that certain lines do not follow the general direction of the coast, or do not follow it sufficiently closely, or that they do not respect the natural connection existing between certain sea areas and the land formations separating or surrounding them. For these reasons, it is alleged that the line drawn is contrary to the principles which govern the delimitation of the maritime domain.

" The Court observes that these complaints, which assumed a very general scope in the written proceedings, have subsequently been reduced.

" The United Kingdom Government has directed its criticism more particularly against two sectors, the delimitation of which they represented as extreme cases of deviation from the general direction of the coast: the sector of Sværholthavet (between base-points 11 and 12) and that of Lopphavet (between base-points 20 and 21). The Court will deal with the delimitation of these two sectors from this point of view.

" The base-line between points 11 and 12, which is 38.6 sea miles in length, delimits the waters of the Sværholt lying between Cape Nordkyn and the North Cape. The United Kingdom Government denies that the basin so delimited has the character of a bay. Its argument is founded on a geographical consideration. In its opinion, the calculation of the basin's penetration inland must stop at the tip of the Sværholt peninsula (Sværholtklubben). The penetration inland thus

Case No. 36 *Contd.*

obtained being only 11.5 sea miles, as against 38.6 miles of breadth at the entrance, it is alleged that the basin in question does not have the character of a bay. The Court is unable to share this view. It considers that the basin in question must be contemplated in the light of all the geographical factors involved. The fact that a peninsula juts out and forms two wide fjords, the Laksefjord and the Porsangerfjord, cannot deprive the basin of the character of a bay. It is the distances between the disputed base-lines and the most inland point of these fjords, 50 and 75 sea miles respectively, which must be taken into account in appreciating the proportion between the penetration inland and the width at the mouth. The Court concludes that Sværholthavet has the character of a bay.

" The delimitation of the Lopphavet basin has also been criticized by the United Kingdom. As has been pointed out above, its criticism of the selection of base-point No. 21 may be regarded as abandoned. The Lopphavet basin constitutes an ill-defined geographic whole. It cannot be regarded as having the character of a bay. It is made up of an extensive area of water dotted with large islands which are separated by inlets that terminate in the various fjords. The base-line has been challenged on the ground that it does not respect the general direction of the coast. It should be observed that, however justified the rule in question may be, it is devoid of any mathematical precision. In order properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the *general* direction of the coast. Therefore, one cannot confine oneself to examining one sector of the coast alone, except in a case of manifest abuse ; nor can one rely on the impression that may be gathered from a large scale chart of this sector alone. In the case in point, the divergence between the base-line and the land formations is not such that it is a distortion of the general direction of the Norwegian coast.

" Even if it were considered that in the sector under review the deviation was too pronounced, it must be pointed out that the Norwegian Government has relied upon an historic title clearly referable to the waters of Lopphavet, namely, the exclusive privilege to fish and hunt whales granted at the end of the 17th century to Lt.-Commander Erich Lorch under a number of licences which show, *inter alia*, that the water situated in the vicinity of the sunken rock of Gjesbaaen or Gjesboene and the fishing grounds pertaining thereto were regarded as falling exclusively within Norwegian sovereignty. But it may be observed that the fishing grounds here referred to are made up of two banks, one of which, the Indre Gjesboene, is situated between the base-line and the limit reserved for fishing, whereas the other, the Ytre Gjesboene, is situated further to seaward and beyond the fishing limit laid down in the 1935 Decree.

" These ancient concessions tend to confirm the Norwegian Government's contention that the fisheries zone reserved before 1812 was in fact much more extensive than the one delimited in 1935. It is suggested that it included all fishing banks from which land was visible, the range of vision being, as is recognized by the United Kingdom Government, the principle of delimitation in force at that time. The Court considers that, although it is not always clear to what specific areas they apply, the historical data produced in support of this contention by the Norwegian Government lend some weight to the idea of the survival of traditional rights reserved to the inhabitants of the Kingdom over fishing grounds included in the 1935 delimitation, particularly in the case of Lopphavet. Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable.

" As to the Vestfjord, after the oral argument, its delimitation no longer presents the importance it had in the early stages of the proceedings. Since the Court has found that the waters of the Indreleia are internal waters, the waters of the Vestfjord, as indeed the waters of all other Norwegian fjords, can only be regarded as internal waters. In these circumstances, whatever difference may still exist between the views of the United Kingdom Government and those of the Norwegian Government on this point, is negligible. It is reduced to the question whether the base-line should be drawn between points 45 and 46 as fixed by the 1935 Decree, or whether the line should terminate at the Kalsholmen lighthouse on Tenholmerne. The Court considers that this question is purely local in character and of secondary importance, and that its settlement should be left to the coastal State."

[Report: *I.C.J. Reports*, 1951, p. 116.]

Judge Alvarez delivered a Separate Opinion in which he said, in part, as follows:

> " In considering the present case, I propose to follow a method different from that which is customarily adopted, particularly with regard to the law. It consists of bringing to light and retaining the principal facts, then of considering the points of law dominating the whole case and, finally, those which relate to each important question.
>
> " The application of this method may, at first sight, appear to be somewhat academic; but it is essentially practical, since it has as its object the furnishing of direct answers to be given on the questions submitted to the Court.
>
> " Moreover, this method is called for by reason of the double task which the Court now has: the resolution of cases submitted to it and the development of the law of nations.

Case No. 36 *Contd.*

" It is commonly stated that the present Court is a continuation of the former Court and that consequently it must follow the methods and the jurisprudence of that Court. This is only partly true, for in the interval which elapsed between the operations of the Courts, a World War occurred which involved rapid and profound changes in international life and greatly affected the law of nations.

" These changes have underlined the importance of the Court's second function. For it now happens with greater frequency than formerly that, on a given topic, no applicable precepts are to be found, or that those which do exist present lacunae or appear to be obsolete, that is to say, they no longer correspond to the new conditions of the life of peoples. In all such cases, the Court must *develop* the law of nations, that is to say, it must remedy its shortcomings, adapt existing principles to these new conditions and, even if no principles exist, create principles in conformity with such conditions. The Court has already very successfully undertaken the creation of law in a case which will remain famous in the annals of international law (Advisory Opinion of April 11th, 1949, on ' Reparation for injuries suffered in the service of the United Nations '). The Court, in this case, can effectively discharge the same task.

" The adaptation of the law of nations to the new conditions of international life, which is to-day necessary, is something quite different from the ' Restatement ' advocated by Anglo-Saxon jurists as a means of ending the crisis in international law, which consists merely of stating the law as it has been established and applied up to the present, without being too much concerned with any changes that it may recently have undergone or which it may undergo in the future. . . .

" The Parties, in their Pleadings and in their Oral Arguments, have advanced a number of theories, as well as systems, practices and, indeed, rules which they regarded as constituting international law. The Court thought that it was necessary to take them into consideration. These arguments, in my opinion, marked the beginning of a serious distortion of the case.

" In accordance with uniformly accepted doctrine, international judicial tribunals must, in the absence of principles provided by conventions, or of customary principles on a given question, apply the *general principles of law.* This doctrine is expressly confirmed in Article 38 of the Statute of the Court.

" It should be observed in this connection that international arbitration is now entering a new phase. It is not enough to stress the general principles of law recognized by civilized nations ; regard must also be had, as I have said, to the modifications which these principles may have undergone as a result of the great changes which have occurred in international life, and the principles must be *adapted* to the new conditions of international life ; indeed, if no principles exist covering a given question, principles must be *created* to conform to those conditions.

" The taking into consideration of these general principles, and their adaptation, are all the more necessary in the present case, since the United Kingdom has asked the Court to declare that the Norwegian Decree of 1935 is contrary to the principles of international law now in force.

" What are the principles of international law which the Court must have recourse to and, if necessary, adapt ? And what are the principles which it must in reality create ?

" It should, in the first place, be observed that frequent reference is made to the *principles* of the law of nations, in conventions and in certain of the Judgments of the Permanent Court of International Justice, but it is not said what those principles are nor where they may be found.

" Some clarification is therefore necessary on this point.

" In the first place, many of the principles, particularly the great principles, have their origin in the legal conscience of peoples (the psychological factor). This conscience results from social and international life; the requirements of this social and international life naturally give rise to certain norms considered necessary to govern the conduct of States *inter se*.

" As a result of the present dynamic character of the life of peoples, the principles of the law of nations are continually being created, and they undergo more or less rapid modification as a result of the great changes occurring in that life.

" For the principles of law resulting from the juridical conscience of peoples to have any value, they must have a tangible manifestation, that is to say, they must be expressed by authorized bodies.

" Up to the present, this juridical conscience of peoples has been reflected in conventions, customs and the opinions of qualified jurists.

" But profound changes have occurred in this connection. *Conventions* continue to be a very important form for the expression of the juridical conscience of peoples, but they generally lay down only new principles, as was the case with the Convention on genocide. On the other hand, *customs* tend to disappear as the result of the rapid changes of modern international life; and a new case strongly stated may be sufficient to render obsolete an ancient custom. Customary law, to which such frequent reference is made in the course of the arguments, should therefore be accepted only with prudence.

" The further means by which the juridical conscience of peoples may be expressed at the present time are the resolutions of diplomatic assemblies, particularly those of the United Nations and especially the decisions of the International Court of Justice. Reference must also be made to the recent legislation of certain countries, the resolutions of the great associations devoted to the study of the law of nations, the works of the Codification Commission set up by the United Nations, and finally, the opinions of qualified jurists.

" These are the new elements on which the new international law, still in the process of formation, will be founded. This law will, consequently, have a character entirely different from that of traditional or classical international law, which has prevailed to the present time.

" Let us now consider the elements by means of which the general principles brought to light are to be adapted to the existing conditions of international life and by means of which new principles are, if necessary, to be created.

" The starting point is the fact that, for the traditional *individualistic* régime on which social life has hitherto been founded, there is being substituted more and more a new régime, a régime of *interdependence*, and that, consequently, the *law of social interdependence* is taking the place of the old individualistic law.

" The characteristics of this law, so far as international law is concerned, may be stated as follows :

" (*a*) This law governs not merely a *community* of States, but an organized international *society*.

" (*b*) It is not exclusively juridical; it has also aspects which are political, economic, social, psychological, etc. It follows that the traditional distinction between *legal* and *political* questions, and between the domain of law and the domain of politics is considerably modified at the present time.

" (*c*) It is concerned not only with the delimitation of the rights of States but also with harmonizing them.

" (*d*) It particularly takes into account the general interest.

" (*e*) It also takes into account all possible aspects of every case.

Case No. 36 Contd.

" (*f*) It lays down, besides rights, obligations towards international society; and sometimes States are entitled to exercise certain rights only if they have complied with the correlative duties. (Title V of the 'Declaration of the Great Principles of Modern International Law' approved by three great associations devoted to the study of the law of nations.)

" (*g*) It condemns *abus de droit.*

" (*h*) It adapts itself to the needs of international life and develops side by side with it.

" What are the principles which, in accordance with the foregoing, the Court must bring to light, adapt if necessary, or even create, with regard to the maritime domain and, in particular, the territorial sea ?

" They may be stated as follows :

" 1. Having regard to the great variety of the geographical and economic conditions of States, it is not possible to lay down uniform rules, applicable to all, governing the extent of the territorial sea and the way in which it is to be reckoned.

" 2. Each State may therefore determine the extent of its territorial sea and the way in which it is to be reckoned, provided it does so in a reasonable manner, that it is capable of exercising supervision over the zone in question and of carrying out the duties imposed by international law, that it does not infringe rights acquired by other States, that it does no harm to general interests and does not constitute an *abus de droit.*

" In fixing the breadth of its territorial sea, the State must indicate the reasons, geographic, economic, etc., which provide the justification therefor.

" In the light of this principle, it is no longer necessary to debate questions of base-lines, straight lines, closing lines of ten sea miles for bays, etc., as has been done in this case.

" Similarly, if a State adopts too great a breadth for its territorial sea, having regard to its land territory and to the needs of its population, or if the base-lines which it indicates appear to be arbitrarily selected, that will constitute an *abus de droit.*

" 3. States have certain rights over their territorial sea, particularly rights to the fisheries ; but they also have certain duties, particularly those of exercising supervision off their coasts, of facilitating navigation by the construction of lighthouses, by the dredging of certain areas of sea, etc.

" 4. States may alter the extent of the territorial sea which they have fixed, provided that they furnish adequate grounds to justify the change.

" 5. States may fix a greater or lesser area beyond their territorial sea over which they may reserve for themselves certain rights : customs, police rights, etc.

" 6. The rights indicated above are of great weight if established by a group of States, and especially by all the States of a continent.

" The countries of Latin America have, individually or collectively, reserved wide areas of their coastal waters for specific purposes : the maintenance of neutrality, customs' services, etc., and, lastly, for the exploitation of the wealth of the continental shelf.

" 7. Any State directly concerned may raise an objection to another State's decision as to the extent of its territorial sea or of the area beyond it, if it alleges that the conditions set out above for the determination of these areas have been violated. Disputes arising out of such objections must be resolved in accordance with the provisions of the Charter of the United Nations.

" 8. Similarly, for the great bays and straits, there can be no uniform rules. The international status of every great bay and strait must be determined by the coastal States directly concerned, having regard to the general interest. The position here must be the same as in the case of the great international rivers : each case must be subject to its own special rules.

" At the Conference held in Barcelona in 1921 on navigable waterways, I maintained that it was impossible to lay down general and uniform rules for all international rivers, in view of the great variety of conditions of all sorts obtaining among them ; and this point of view was accepted.

" In short, in the case of maritime and river routes, it is not possible to contemplate the laying down of uniform rules ; the rules must accord with the realities of international life. In place of uniformity of rules it is necessary to have variety ; but the general interest must always be taken into account.

" 9. A principle which must receive special consideration is that relating to prescription. This principle, under the name of *historic rights*, was discussed at length in the course of the hearings.

" The concept of prescription in international law is quite different from that which it has in domestic law. As a result of the important part played by force in the formation of States, there is no prescription with regard to their territorial status. The political map of Europe underwent numerous changes in the course of the 19th and 20th centuries ; it is to-day very different from what it was before the Great War, without any application of the principle of prescription.

" Nevertheless, in some instances, prescription plays a part in international law and it has certain important features. It is recognized, in particular, in the case of the acquisition and the exercise of certain rights.

" In support of the effect of prescription in such cases, two very important learned works should be mentioned, which adopt the collective opinions of jurists.

" The first of these is the ' Declaration of the Great Principles of Modern International Law ' which provides, in Article 20 : ' No State is entitled to oppose, in its own interests, the making of rules on a question of general interest.

" ' When, however, it has exercised special rights for a considerable time, account must be taken of this in the making of rules.'

" The other learned work is the ' Draft Rules for the Territorial Sea in Peacetime ' adopted by the Institute of International Law at the 1928 Session in Stockholm. Article 2 of this draft provides :

> ' The breadth of the territorial sea is 3 miles. (It was then thought that this was sufficient.)
>
> ' International usage may justify the recognition of a breadth greater or less than 3 miles.'

" For prescription to have effect, it is necessary that the rights claimed to be based thereon should be well established, that they should have been uninterruptedly enjoyed and that they should comply with the conditions set out in 2 above.

" International law does not lay down any specific duration of time necessary for prescription to have effect. A comparatively recent usage relating to the territorial sea may be of greater effect than an ancient usage insufficiently proved.

" 10. It is also necessary to pay special attention to another principle which has been much spoken of : the right of States to do everything which is not expressly forbidden by international law. This principle, formerly correct, in the days of absolute sovereignty, is no longer so at the present day : the sovereignty of States is henceforth limited not only by the rights of other States but also by other factors previously indicated, which make up what is called the new international law : the Charter of the United Nations, resolutions passed by the Assembly of the United Nations, the duties of States, the general

Case No. 36 *Contd.*

interests of international society and lastly the prohibition of *abus de droit*.

" 11. Any State alleging a principle of international law must prove its existence ; and one claiming that a principle of international law has been abrogated or has become ineffective and requires to be renewed, must likewise provide proof of this claim.

" 12. Agreement between the Parties as to the existence of a principle of law, or as to its application, for instance, as to the way in which base-lines determining the extent of the territorial sea are to be selected, etc., cannot have any influence upon the decision of the Court on the question.

" 13. International law takes precedence over municipal law. Acts committed by a State which violate international law involve the responsibility of that State.

" 14. A State is not obliged to protest against a violation of international law, unless it is aware or ought to be aware of this violation ; but only the State directly concerned is entitled to refer the matter to the appropriate international body. (Article 39 of the ' Declaration of the Great Principles of Modern International Law '.)

" In accordance with the considerations set out above, I come to the following conclusions upon the questions submitted to the Court :

" (1) Norway—like all other States—is entitled, in accordance with the general principles of the law of nations now in existence, to determine not only the breadth of her territorial sea, but also the manner in which it is to be reckoned.

" (2) The Norwegian Decree of 1935, which delimited the Norwegian territorial sea, is not contrary to any express provisions of international law. Nor is it contrary to the general principles of international law, because the delimitation is reasonable, it does not infringe rights acquired by other States, it does no harm to general interests and does not constitute an *abus de droit*.

" In enacting the Decree of 1935, Norway had in view simply the needs of the population of the areas in question.

" (3) In view of the foregoing, it is unnecessary to consider whether or not Norway acquired by prescription a right to lay down a breadth of more than three sea miles for her territorial sea and the way in which its base-lines should be selected.

" (4) If Norway is entitled to fix the extent of her territorial sea, as has been said, it is clear that she can prohibit other States from fishing within the limits of that sea without their being entitled to complain of a violation of their rights.

" (5) The answer to the contentions of the Parties with regard to the existence of certain precepts of the law of nations which they consider to be in force at the present time has been given in the preceding pages."

In his Separate Opinion Judge Hsu Mo said as follows :

" I agree with the finding of the Court that the method of straight lines used in the Norwegian Royal Decree of July 12th, 1935, for the delimitation of the fisheries zone, is not contrary to international law. But I regret that I am unable to share the view of the Court that all the straight base-lines fixed by that Decree are in conformity with the principles of international law.

" It is necessary to emphasize the fact that Norway's method of delimiting the belt of her northern territorial sea by drawing straight lines between point and point, island and island, constitutes a deviation from what I believe to be a general rule of international law, namely, that, apart from cases of bays and islands, the belt of territorial sea should be measured, in principle, from the line of the coast at low tide.

International law permits, in certain circumstances, deviations from this general rule. Where the deviations are justifiable, they must be recognized by other States. Norway is justified in using the method of straight lines because of her special geographical conditions and her consistent past practice which is acquiesced in by the international community as a whole. But for such physical and historical facts, the method employed by Norway in her Decree of 1935 would have to be considered to be contrary to international law. In examining, therefore, the question of the validity or non-validity of the base-lines actually drawn by Norway, it must be borne in mind that it is not so much the direct application of the general rule as the degree of deviation from the general rule that is to be considered. The question in each case is : how far the line deviates from the configuration of the coast and whether such deviation, under the system which the Court has correctly found Norway to have established, should be recognized as being necessary and reasonable.

" The examination of each base-line cannot thus be undertaken in total disregard of the coast line. In whatever way the belt of territorial sea may be determined, it always remains true that the territorial sea owes its existence to land and cannot be completely detached from it. Norway herself recognizes that the base-lines must be drawn in a reasonable manner and must conform to the general direction of the coast.

" The expression ' to conform to the general direction of the coast ', being one of Norway's own adoption and constituting one of the elements of a system established by herself, should not be given a too liberal interpretation, so liberal that the coast line is almost completely ignored. It cannot be interpreted to mean that Norway is at liberty to draw straight lines in any way she pleases provided they do not amount to a deliberate distortion of the general outline of the coast when viewed as a whole. It must be interpreted in the light of the local conditions in each sector with the aid of a relatively large scale chart. If the words ' to conform to the general direction of the coast ' have any meaning in law at all, they must mean that the base-lines, straight as they are, should follow the configuration of the coast as far as possible and should not unnecessarily and unreasonably traverse great expanses of water, taking no account of land or islands situated within them.

" Having examined the different sectors of the territorial sea as delimited by the Decree of 1935, I find two obvious cases in which the base-line cannot be considered to have been justifiably drawn. I refer to the base-line between points 11 and 12, which traverses Sværholthavet, and the base-line between points 20 and 21, which runs across Lopphavet.

" In the former case, the base-line, being 39 miles long, encloses a large area of the sea as Norwegian internal waters. The question to be determined here is whether the line is to be considered as the closing line of a bay or whether it is simply a line joining one base-point to another. If it is the former, it will be necessary to determine whether the area in question constitutes a bay in international law. In my opinion, the area is a combination of bays, large and small, eight in all, but not a bay in itself. It is not a bay in itself simply because it does not have the shape of a bay. To treat a number of adjacent bays as an entity, thereby completely ignoring their respective closing lines, would result in the creation of an artificial and fictitious bay, which does not fulfil the requirements of a bay, either in the physical or in the legal sense. There is no rule of international law which permits the creation of such kind of bay.

" It has been argued by the Agent of the Norwegian Government that the fact that the Sværholt peninsula protrudes into the waters in question to form the two fjords of Laksefjord and Porsangerfjord cannot deprive these waters of the character of a bay. But geographically and legally, it is precisely the existence of this peninsula that makes the two fjords separate and distinct bays, and it is this fact, coupled with the protrusion of smaller peninsulas on either side of the two fjords, that gives to this part of the coast (the section between points 11 and 12), not the character of a bay, but merely the character of a curvature, a large concavity formed by the closing lines of several independent bays. Nature having created a number of bays, neighbouring but distinct from one another, the littoral State cannot, by the exercise of its sovereignty, turn them into one bay by drawing a long line between two most extreme points.

" If the base-line over Særholthavet is not the closing line of a bay, it must be just one of the straight lines joining one base-point to another. In that case, I fail to see how that line can be considered to conform to the general direction of the coast. In order to follow the general configuration of the coast, it should take into account at least some of the points which serve as the starting or terminal points of the closing lines of the bays now enclosed by the long line in question. To leave out all the points on land which interpose between the two extreme points Nos. 11 and 12 and to enclose the whole concavity by drawing one excessively long line is tantamount to using the straight line method to extend seaward the four-mile breadth of the territorial sea. The application of the method in this manner cannot, in my view, be considered as reasonable.

" In the case of Lopphavet, the line connecting points 20 and 21, being 44 miles in length, affects an area of water of several hundred square miles. Norway does not claim this expanse of water to be a bay, and, indeed, by no stretch of the imagination could it be considered as a bay. Since Lopphavet is not a bay, there does not exist any legal reason for the base-line to skip over two important islands, Loppa and Fuglöy, each of which forms a unit of the ' skjærgaard '. In ignoring these islands, the base-line makes an obviously excessive deviation from the general direction of the coast. For this reason, it cannot be regarded as being justifiable.

" The Agent of the Norwegian Government remarked during the oral proceedings that the basin of Lopphavet led to the Indreleia which should be considered as Norwegian internal waters. I do not think that the Indreleia has anything to do with the region in question. For the Indreleia, according to the charts furnished by the Norwegian Government, goes through the Kaagsund between the islands of Arnöy and Kaagen and proceeds northward and northeastward between the islands of Loppa and Loppakalven on the one hand and the mainland on the other, finally bending into the Söröysund. It does not at all cut through Lopphavet outside the islands of Arnöy, Loppa and Söröy. Consequently, it does not overlap any portion of the immense area in this sector enclosed by the long base-line as Norwegian internal waters.

" I have so far examined the question of the validity or otherwise of the two base-lines, the one affecting Særholthavet, the other Lopphavet, exclusively from the aspect of their conformity or non-conformity with the general direction of the coast. It remains to consider whether Norway may base her claim in respect of the two regions on historical grounds. In my opinion, notwithstanding all the documents she has produced, she has not succeeded in establishing any historic title to the waters in question.

" In support of her historic title, Norway has relied on habitual fishing by the local people and prohibition of fishing by foreigners. As far as the fishing activities of the coastal inhabitants are concerned, I need only point out that individuals, by undertaking enterprises on their own initiative, for their own benefit and without any delegation of authority by their Government, cannot confer sovereignty on the State, and this despite the passage of time and the absence of molestation by the people of other countries. As for prohibition by the Norwegian Government of fishing by foreigners, it is undoubtedly a kind of State action which militates in favour of Norway's claim of prescription. But the Rescripts on which she has relied contain one fatal defect: the lack of precision. For they fail to show any precise and well-defined areas of water, in which prohibition was intended to apply and was actually enforced. And precision is vital to any prescriptive claim to areas of water which might otherwise be high seas.

" With regard to the licenses for fishing granted on three occasions by the King of Denmark and Norway to Erich Lorch, Lieutenant-Commander in the Dano-Norwegian Navy towards the close of the 17th century, I do not think that this is sufficient to confer historic title on Norway to Lopphavet. In the first place, the granting by the Danish-Norwegian Sovereign to one of his own subjects of what was at the time believed to be a special privilege can hardly be considered as conclusive evidence of the acquisition of historic title to Lopphavet vis-à-vis all foreign States. In the second place, the concessions were limited to waters near certain rocks and did not cover the whole area of Lopphavet. Lastly, there is no evidence to show that the concessions were exploited to the exclusion of participation by all foreigners for a period sufficiently long to enable the Norwegian Government to derive prescriptive rights to Lopphavet.

" My conclusion is therefore that neither by the test of conformity with the general direction of the coast, nor on historical grounds, can the two base-lines drawn across Sværholthavet and Lopphavet, respectively, be considered as being justifiable under the principles of international law."

Judge Sir Arnold McNair delivered a Dissenting Opinion as follows:

" In this case the Court has to decide whether certain areas of water off the coast of Norway are high seas or Norwegian waters, either territorial or internal. If they are high seas, then foreign fishermen are authorized to fish there. If they are Norwegian waters, then foreign fishermen have no right to fish there except with the permission of Norway. I have every sympathy with the small inshore fisherman who feels that his livelihood is being threatened by more powerfully equipped competitors, especially when those competitors are foreigners; but the issues raised in this case concern the line dividing Norwegian waters from the high seas, and those are issues which can only be decided on a basis of law.

" The preamble and the executive parts of the Decree of 1935 are as follows:

> ' On the basis of well-established national titles of right;
>
> by reason of the geographical conditions prevailing on the Norwegian coasts;
>
> in safeguard of the vital interests of the inhabitants of the northernmost parts of the country;
>
> and in accordance with the Royal Decrees of the 22nd February, 1812, and 16th October, 1869, the 5th January, 1881, and the 9th September, 1889.
>
> are hereby established lines of delimitation towards the high sea of the Norwegian fisheries zone as regards that part of Norway which is situated northward of 66° 28,8′ North latitude.
>
> These lines of delimitation shall run parallel with straight base-lines drawn between fixed points on the mainland, on islands or rocks, starting from the final point of the boundary line of the

Case No. 36 *Contd.*

Realm in the easternmost part of Varangerfjorden and going as far as Træna in the County of Nordland.

The fixed points between which the base-lines shall be drawn are indicated in detail in a schedule annexed to this Decree.'

[Schedule]

" Mr. Arntzen, the Norwegian Agent and Counsel, told the Court (October 5th) that :

> ' The Decree of 1935 is founded on the following principles : the Norwegian territorial zone is four sea-miles in breadth. It is measured from straight lines which conform to the general direction of the coast and are drawn between the outermost islands, islets and reefs in such a way as never to lose sight of the land.'

" Although the Decree of 1935 does not use the expression ' territorial sea ' or ' waters ' or ' zone ', it cannot be denied that the present dispute relates to the Norwegian territorial sea. The Judgment of the Court is emphatic on this point. The same point emerges clearly from the United Kingdom's Application instituting the proceedings and was insisted upon in the Norwegian written and oral argument on numerous occasions. Thus, on October 9th, the Norwegian Counsel, Professor Bourquin, said :

> ' What is the subject of the dispute ? It relates to the base-lines —that is to say, to the lines from which the four miles of the Norwegian territorial sea are to be reckoned. . . .'

" And again, in his oral reply he said on October 25th :

> ' What [Norway] claims—apart from her historic title—is that the limits imposed by international law with regard to the delimitation of her maritime territory have not been infringed by the 1935 Decree and that this Decree can therefore be set up as against the United Kingdom without any necessity for any special acquiescence on the part of the United Kingdom.'

" One thing this dispute clearly is not. It is not a question of the right of a maritime State to declare the existence of a contiguous zone beyond its territorial waters, in which zone it proposes to take measures for the conservation of stocks of fish. An illustration of this is to be found in President Truman's ' Proclamation with respect to Coastal Fisheries in certain areas of the High Seas, dated September 28th, 1945 ' (*American Journal of International Law*, Vol. 40, 1946, Official Documents, p. 46) ; it will suffice to quote the following statement :

> ' The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected.'

" That is not this case, for here the question is whether certain disputed areas of sea water are parts of the high seas or parts of the territorial or internal waters of the coastal State.

" In the course of the proceedings in the case, the United Kingdom has made certain admissions or concessions which can be summarized as follows :

" (*a*) that for the purposes of this case Norway is entitled to a four-mile limit ;

" (*b*) that the waters of the fjords and sunds (including the Varangerfjord and Vestfjord) which fall within the conception of a bay, are, subject to a minor point affecting the status of the Vestfjord which I do not propose to discuss, Norwegian internal waters ; and

" (*c*) that (as defined in the Conclusions of the United Kingdom) the waters lying between the island fringe and the mainland are Norwegian waters, either territorial or internal.

" The Parties are also in conflict upon another minor point, namely, the status of the waters in certain portions of Indreleia, about which I do not propose to say anything.

" I shall now summarize the relevant part of the law of territorial waters as I understand it :

" (*a*) To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory consisting of what the law calls territorial waters (and in some cases national waters in addition). International law does not say to a State : ' You are entitled to claim territorial waters if you want them '. No maritime State can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory.

" (*b*) While the actual delimitation of the frontiers of territorial waters lies within the competence of each State because each State knows its own coast best, yet the principles followed in carrying out this delimitation are within the domain of law and not within the discretion of each State. As the Supreme Court of the United States said in 1946 in the *United States* v. *State of California*, 332 U.S. 19, 35 :

> ' The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts. And in so far as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units.' (Cited and re-affirmed in 1950 in *United States* v. *State of Texas*, 339 U.S. 707,718.)

" (*c*) The method of delimiting territorial waters is an objective one and, while the coastal State is free to make minor adjustments in its maritime frontier when required in the interests of clarity and its practical object, it is not authorized by the law to manipulate its maritime frontier in order to give effect to its economic and other social interests. There is an overwhelming consensus of opinion amongst maritime States to the effect that the base-line of territorial waters, whatever their extent may be, is a line which follows the coast-line along low-water mark and not a series of imaginary lines drawn by the coastal State for the purpose of giving effect, even within reasonable limits, to its economic and other social interests and to other subjective factors.

" In 1894 Bonfils (*Droit international public*, § 491) described *la mer juridictionnelle ou littorale*, as :

> ' la bande de l'océan qui entoure et enceint les côtes du territoire continental ou insulaire et sur laquelle l'État peut, du rivage que baignent les eaux de cette mer, faire respecter sa puissance '.

" (*d*) The calculation of the extent of territorial waters from the land is the normal and natural thing to do ; its calculation from a line drawn on the water is abnormal and requires justification, for instance, by showing that the line drawn on the water is drawn from the terminal line of internal waters in a closed bay or an historic bay or a river mouth, which will be dealt with later. One must not lose sight of the practical operation of the limit of territorial waters. It is true that they exist for the benefit of the coastal State and not for that of the foreign mariner approaching them. Nevertheless, if he is to respect them, it is important that their limit should be drawn in such a way that, once he knows how many miles the coastal State claims, he should—whether he is a fisherman or the commander of a belligerent vessel in time of war—be able to keep out of them by following ordinary maritime practice in taking cross-bearings from points on the coast, whenever it is visible, or in some other way. This practical aspect of the matter is confirmed by the practice of Prize Courts in seeking to ascertain whether a prize has been captured within neutral territorial waters or on the high seas ; see, for instance, *The Anne* (1818) *Prize Cases in the United States Supreme Court*, page 1012 ; *The Heina* (1915), Fauchille, *Jurisprudence française en matière de prises*, I, page 119 ; II, page 409, a Norwegian ship captured by a French cruiser in 1914 at a point four miles and five-sixths from an island forming part of the Danish Antilles ; and by decisions upon illegal fishing within territorial waters, e.g. *Ship May* v. *The King*, Canada Law Reports, Supreme Court, 1931, page 374, or upon other illegal entry into territorial waters, *The Ship* ' *Queen City* ' v. *The King*, *ibid.*, page 387.

" (*e*) Reference should also be made to the statement in the Report on Territorial Waters approved by the League Codification Committee in 1927 for transmission to governments for their comments, particularly page 37 of League document C.196.M.70.1927.V., where, after referring to what it calls the seaward limit of the territorial sea, the Report continues :

> ' Mention should also be made of the line which limits the rights of dominion of the riparian State on the landward side. This question is much simpler. The general practice of the States, all projects of codification and the prevailing doctrine agree in considering that this line should be low-water mark along the whole of the coast.'

" (*f*) In 1928 and 1929 replies were sent by a number of governments to the questions put to them by the Committee of Five which made the final preparations for the Hague Codification Conference of 1930 (League of Nations, C.74.M.39.1929.V., pp. 35 *et sqq.*).

" As I understand these replies—the language is not always absolutely plain—seventeen governments declared themselves in favour of the view that the base-line of territorial waters is a line which follows the coast-line along low-water mark and against the view that the base-line consists of a series of lines connecting the outermost points of the mainland and islands. The following Governments took the latter view : Norway, Sweden, Poland, Soviet Russia and, probably, Latvia. (In this respect my analysis corresponds closely to that of paragraph 298 of the Counter-Memorial.)

" It may be added that Poland had recovered sovereignty over her maritime territory only eleven years before, after an interval of more than a century, and that Latvia became a State only in 1918. All the States parties to the North Sea Fisheries Convention of 1882, Belgium, Denmark, France, Germany, Great Britain and the Netherlands, as I understand their replies, accepted the rule of low-water mark following the line of the coast ; so also did the United States of America. Governments are not prone to understate their claims.

" (*g*) It is also instructive to notice the Danish reply because Denmark was, with Norway, the joint author of the Royal Decree of 1812, on which the Norwegian Decree of 1935 purports to be based, and Denmark told the League of Nations Committee that the Decree of 1812 was still in force in Denmark. The Danish reply states that :

> ' Paragraph 2 of Article 3 of the regulations introduced by Royal Decree of January 19th, 1927, concerning the admission of war-

vessels belonging to foreign Powers to Danish ports and territorial waters in time of peace, contains the following clause :

> " Danish internal waters comprise, in addition to the ports, entrances of ports, roadsteads, bays and firths, the waters situated between, and on the shoreward side of, islands, islets and reefs, which are not permanently submerged."
>
> (Quotation from Decree of 1927 ends.)

' Along the coast the low-water mark is taken as a base in determining the breadth of the territorial waters. The distance between the coast and the islands is not taken into account, so long as it is less than double the width of the territorial zone.'

" (*h*) But although this rule of the limit following the coast line along low-water mark applies both to straight coasts and to curved and indented coasts, an exception exists in the case of those indentations which possess such a configuration, both as to their depth and as to the width between their headlands, as to constitute landlocked waters, by whatever name they may be called. It is usual and convenient to call them ' bays ', but what really matters is not their label but their shape.

" A recent recognition of the legal conception of bays is to be found in the reply of the United States of America given in 1949 or 1950 to the International Law Commission, published by the United Nations in Document A/CN.4/19, page 104, of 23rd March, 1950 :

> ' The United States has from the outset taken the position that its territorial waters extend one marine league, or three geographical miles (nearly 3½ English miles) from the shore, with the exception of waters or bays that are so landlocked as to be unquestionably within the jurisdiction of the adjacent State.'

[Then follow a large number of references illustrating this statement.]

" There are two kinds of bay in which the maritime belt is measured from a closing line drawn across it between its headlands, that is to say, at the point where it ceases to have the configuration of a bay. The first category consists of bays whose headlands are so close that they can really be described as landlocked. According to the strict letter and logic of the law, a closing line should connect headlands whenever the distance between them is no more than double the agreed or admitted width of territorial waters, whatever that may be in the particular case. In practice, a somewhat longer distance between headlands has often been recognized as justifying the closing of a bay. There are a number of treaties that have adopted ten miles, in particular the Anglo-French Convention of 1839, and the North Sea Fisheries Convention of 1882, which was signed and ratified by Germany, Belgium, Denmark, France, Great Britain and the Netherlands. It cannot yet be said that a closing line of ten miles forms part of a rule of customary law, though probably no reasonable objection could be taken to that figure. At any rate Norway is not bound by such a rule. But the fact that there is no agreement upon the figure does not mean that no rule at all exists as to the closing line of curvatures possessing the character of a bay, and that a State can do what it likes with its bays ; for the primary rule governing territorial waters is that they form a belt or *bande de mer* following the line of the coast throughout its extent, and if any State alleges that this belt ought not to come inside a particular bay and follow its configuration, then it is the duty of that State to show why that bay forms an exception to this general rule.

" The other category of bay whose headlands may be joined for the purpose of fencing off the waters on the landward side as internal waters is the historic bay, and to constitute an historic bay it does not suffice merely to claim a bay as such, though such claims are not uncommon. Evidence is required of a long and consistent assertion of dominion over the bay and of the right to exclude foreign vessels except on permission. The matter was considered by the British Privy Council in the case of Conception Bay in Newfoundland in *Direct United States Cable Company* v. *Anglo-American Telegraph Company* (1877) 2 Appeal Cases 394. The evidence relied upon in that case as justifying the claim of an historic bay is worth noting. There was a Convention of 1818 between the United States of America and Great Britain which excluded American fishermen from Conception Bay, followed by a British Act of Parliament of 1819, imposing penalties upon ' any person ' who refused to depart from the bay when required by the British Governor. The Privy Council said :

> ' It is true that the Convention would only bind the two nations who were parties to it, and consequently that, though a strong assertion of ownership on the part of Great Britain, acquiesced in by so powerful a State as the United States, the Convention, though weighty, is not decisive. But the Act already referred to . . . goes further ' . . . ' No stronger assertion of exclusive dominion over these bays could well be framed.' [This Act] ' is an unequivocal assertion of the British legislature of exclusive dominion over this bay as part of the British territory. And as this assertion of dominion has not been questioned by any nation from 1819 down to 1872, when a fresh Convention was made, this would be very strong in the tribunals of any nation to show that this bay is by prescription part of the exclusive territory of Great Britain. . . .'

" Claims to fence off and appropriate areas of the high seas by joining up headlands have been made from time to time, but usually in the case of particular pieces of water and not on the thorough-going scale of the Decree of 1935. There is a considerable body of legal authority condemning this practice. This theory—to the effect that the coastal State is at liberty to draw a line connecting headlands on its coast and to claim the waters on the landward side of that line as its own waters—has sometimes been referred to as the ' headland theory ' or ' la théorie ' or ' la doctrine des caps '.

" There are two decisions by an umpire called Bates in arbitrations between the United States of America and the United Kingdom in 1853 or 1854 (Moore's *International Arbitrations*, Vol. 4, pp. 4342–5) : the *Washington*, seized while fishing within a line connecting the headlands of the Bay of Fundy, which is 65 to 75 miles wide and 130 to 140 miles long and ' has several bays on its coasts ', and the *Argus*, seized while fishing 28 miles from the nearest land and within a line connecting two headlands on the north-east side of the island of Cape Breton ; I do not know the distance between them. In both cases, the seizures were condemned and compensation was awarded to the owners of the vessels. In the *Washington* the umpire said :

> ' It was urged on behalf of the British Government that by coasts, bays, etc., is understood an imaginary line, drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty extends three marine miles outside of this line ; thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy against Americans and others, making the latter a British bay. This doctrine of headlands is new, and has received a proper limit in the Convention between France and Great Britain of August 2nd, 1839, in which " it is agreed that the distance of three miles fixed as the limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland ".'

" Then, in 1881, Mr. Evarts, American Secretary of State, sent a despatch to the American representative in Spain which contained the following passage (Moore's *Digest of International Law*, i, p. 719):

> ' Whether the line which bounds seaward the three-mile zone follows the indentations of the coast or extends from headland to headland is the question next to be discussed.
>
> ' The headland theory, as it is called, has been uniformly rejected by our Government, as will be seen from the opinions of the Secretaries above referred to. The following additional authorities may be cited on this point:
>
> . . . . . .
>
> ' In the opinion of the umpire of the London Commission of 1853 [I think he refers to the *Washington* or the *Argus*], it was held that: " It can not be asserted as a general rule, that nations have an exclusive right of fishery over all adjacent waters to a distance of three marine miles beyond an imaginary line drawn from headland to headland ".'

He concluded:

> ' We may therefore regard it as settled that, so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign.'

" And ' la théorie des caps ' is condemned by Fauchille, *Droit international public*, para. 493 (6), in the words: ' Elle ne saurait juridiquement prévaloir : elle est une atteinte manifeste à la liberté des mers '.

" I shall now examine the Decree of 1935 and direct attention to the results produced by the ' straight base-lines ' which it lays down. It is difficult without the visual aid of large-scale charts to convey a correct picture of the base-lines and the outer lines of delimitation established by the Decree of 1935. The area affected begins at Træna on the north-west coast not far from the entrance to Vestfjord and runs round North Cape down to the frontier with Russia near Grense-Jacobselv, the total length of the outer line being about 560 sea miles without counting fjords and other indentations. There are 48 fixed points—often arbitrarily selected—between which the base-lines are drawn. Twelve of these base-points are located on the mainland or islands, 36 of them on rocks or reefs. Some of the rocks are drying rocks and some permanently above water. The length of the base-lines and the corresponding outer lines varies greatly. At some places, where there are two or more rocks at a turning point, the length of the base-lines may be only a few cables. At other places the length is very great, for instance,

between	5	and	6	25 miles
	7	,,	8	19 ,,
	8	,,	9	25 ,,
	11	,,	12	39 ,,
	12	,,	13	19 ,,
	18	,,	19	26½ ,,
	19	,,	20	19.6 ,,
	20	,,	21	44 ,,
	21	,,	22	18 ,,
	25	,,	26	19½ ,,
	27	,,	28	18 ,,

Case No. 36 *Contd.*

"I have omitted the base-lines connecting base-points 1 and 2 and base-points 45 and 46, which are respectively 30 and 40 miles, because they are the closing lines of Varangerfjord and Vestfjord, and these fjords, like the others, have been conceded by the United Kingdom to be Norwegian waters, subject to a minor controversy as to the precise position of the closing line of the latter. I have also omitted mention of all base-lines less than 18 miles.

"The base-line connecting base-points 20 and 21 (44 miles) rests for a brief moment upon Vesterfall in Gasan (21), a drying rock eight miles from the nearest island, and then continues, with an almost imperceptible bend, in the same direction for a further 18 miles to base-point 22, a drying rock; thus between base-points 20 and 22 we get an almost completely straight line of 62 miles. Again, the base-line which connects base-points 18 and 20, both above-water rocks, runs absolutely straight for 46.1 miles.

"In order to illustrate the distance between many parts on the outer lines and the land, I shall take two sectors which I find particularly difficult to reconcile with the ordinary conception of the maritime belt—namely, that comprised by base-points 11 and 12 (39 miles apart), an area sometimes called Særholthavet, and that comprised by base-points 20 and 21 (44 miles apart), an area sometimes called Lopphavet. In each case I propose to proceed along the outer line and take, at intervals of 4 miles, measurements in miles *from the outer line to the nearest land on the mainland or on an island*:

"*Sværholthavet*: Measurements to mainland or islands from the *outer* line, at intervals of 4 miles proceeding from base-point 11 to base-point 12 are as follows: 4 miles at base-point 11, then 5½, 8½, 11, 13, 12 (or 11 from a lighthouse), 11 (or 9 from a lighthouse), 8, 6, and nearly 5;

"*Lopphavet*: Measurements to mainland or islands from the *outer* line, at intervals of 4 miles proceeding from 20 to 21, are as follows: 4 miles at base-point 20, then 6, 8½, 12, 16, 16, 18, 17, 14½, 12½ (or 8 from base-point 21, a drying rock), 12 (or 5 from base-point 21).

"Moreover, each of these two areas—Sværholthavet and Lopphavet—in no sense presents the configuration of a bay and comprises a large number of named and unnamed fjords and sunds which have been admitted by the United Kingdom to be Norwegian internal waters within their proper closing lines. In one part of Lopphavet the outer line is distant more than 20 miles from the closing line of a fjord. In the opinion of the Court (see p. 141) Lopphavet 'cannot be regarded as having the character of a bay'; and I may refer to an additional circumstance which militates against the opinion that the whole of this large area is Norwegian waters: that is, that according to the (British Admiralty) *Norway Pilot*, Part III, page 607, the approach to the port of Hammerfest through Söröysundet, which runs out of Lopphavet towards Hammerfest, 'is the shortest and, on the whole, the best entrance to Hammerfest from westward, especially in bad weather'; see *The Alleganean* (Moore, *International Arbitrations*, iv, pp. 4332–4341, 'that it can not become the pathway from one nation to another'—as one of the conditions for holding Chesapeake Bay to be a closed historic bay). Another questionable area is that comprised by the lines connecting base-points 24 and 26, totalling 36 miles.

"These three illustrations are among the extreme cases. A more normal base-line is that which connects base-points 5 (a point on the island of Reinoy) and 6 (Korsneset, a headland on the mainland); this base-line—25 miles in length—runs in front of Persfjord, Syltefjord and Makkaufjord, all of which have been admitted by the United Kingdom to be Norwegian internal waters, but the line pays no attention to their closing lines; at no place, however, is the distance between the outer line and the land or closing line of a fjord more than about six miles.

" I draw particular attention to the fact that many, if not most, of the base-lines of the Decree of 1935 fence off many areas of water which contain fjords or bays, and pay little, if any, attention to their closing lines ; in the case of the *Washington*, referred to above, the umpire, in rejecting the claim to treat the Bay of Fundy as a closed bay, twice drew attention to the fact that it comprised other bays within itself : ' it has several bays on its coasts ', and again he refers to ' the imaginary line . . . thus closing all the bays on the shore '.

" The result of the lines drawn by the Decree is to produce a collection of areas of water, of different shapes and sizes and different lengths and widths, which are far from forming a belt or *bande* of territorial waters as commonly understood. I find it difficult to reconcile such a pattern of territorial waters with the almost universal practice of defining territorial waters in terms of miles—be they three or four or some other number. Why speak of three miles or four miles if a State is at liberty to draw lines which produce a maritime belt that is three or four miles wide at the base-points and hardly anywhere else ? Why speak of measuring territorial waters from low-water mark when that occurs at 48 base-*points* and hardly anywhere else ? It is said that this pattern is the inevitable consequence of the configuration of the Norwegian coast, but I shall show later that this is not so.

. . . . . .

" Norway has sought to justify the Decree of 1935 on a variety of grounds, of which the principal are the following (A, B, C and D) :

" (A) That a State has a right to delimit its territorial waters in the manner required to protect its economic and other social interests. This is a novelty to me. It reveals one of the fundamental issues which divide the Parties, namely, the difference between the subjective and the objective views of the delimitation of territorial waters.

" In my opinion the manipulation of the limits of territorial waters for the purpose of protecting economic and other social interests has no justification in law ; moreover, the approbation of such a practice would have a dangerous tendency in that it would encourage States to adopt a subjective appreciation of their rights instead of conforming to a common international standard.

. . . . . .

" (B) That the pattern of territorial waters resulting from the Decree of 1935 is required by the exceptional character of the Norwegian coast.

" Much has been said and written in presenting the Norwegian case for the delimitation made by the Decree of 1935 of the special character of the Norwegian coast, the poverty and barrenness of the land in northern Norway and the vital importance of fishing to the population, and so forth, and of the skerries and ' skjærgaard ', which runs round the south, west and north coasts and ends at North Cape (Norwegian oral argument, 11th October). This plea must be considered in some detail from the point of view both of fact and of law. Norway has no monopoly of indentations or even of skerries. A glance at an atlas will shew that, although Norway has a very long and heavily indented coast-line, there are many countries in the world possessing areas of heavily indented coast-line. It is not necessary to go beyond the British Commonwealth. The coast of Canada is heavily indented in almost every part. Nearly the whole of the west coast of Scotland and much of the west coast of Northern Ireland is heavily indented and bears much resemblance to the Norwegian coast.

" Skerry is a word of Norwegian origin which abounds in Scotland, both as ' skerry ' and as ' sgeir ' (the Gaelic form). The New Oxford Dictionary and any atlas of Scotland afford many illustrations. From this dictionary I extract two quotations : Scoresby, *Journal of Whale Fishery* (1823), page 373 : ' The islands, or skerries, which . . . skirt

Case No. 36 *Contd.*

the forbidding coast on the western side of the Hebrides '; W. McIlwraith, *Guide to Wigtownshire* (1875) (in the south-west of Scotland), page 62: ' The rocks stretch seaward in rugged ledges and skerries '. The following passage occurs in the *Encyclopædia Britannica* (1947), Volume 20, sub-title ' Scotland ', page 141: ' The Western Highland coast is intersected throughout by long narrow sea-lochs or fiords. The mainland slopes steeply into the sea and is fronted by chains and groups of islands. . . . The Scottish sea-lochs must be considered in connection with those of western Ireland and Norway. The whole of this north-western coast line of Europe bears witness to recent submergence.'

" As was demonstrated to the Court by means of charts, in response to a suggestion contained in paragraph 527 of the Counter-Memorial, the north-west coast of Scotland is not only heavily indented but it possesses, in addition, a modest ' island fringe ', the Outer Hebrides, extending from the Butt of Lewis in a south-westerly direction to Barra Head for a distance of nearly one hundred miles, the southern tip being about thirty-five miles from the Skerryvore lighthouse. At present the British line of territorial waters round this island fringe, inside and outside of it, follows the line of the coast and the islands throughout without difficulty and does not, except for the closing lines of lochs not exceeding ten miles, involve straight base-lines joining the outermost points of the islands. This is also true of the heavily indented and mountainous mainland of the north-west coast of Scotland lying inside of and opposite to the Outer Hebrides.

" A further factor that must be borne in mind, in assessing the relevance of the special character of the Norwegian coast, is that not very much of that special character remains after the admissions (referred to above) made by the United Kingdom during the course of the oral proceedings. The main peculiarity that remains is the jagged outer edge of the island fringe or ' skjærgaard '. In estimating the effect of the ' skjærgaard ' as a special factor, it must also be remembered that, running north-west, it ends at North Cape, which is near base-point 12.

" Another special aspect of the Norwegian coast which has been stressed in the Norwegian argument, and is mentioned in the Judgment of the Court, is its mountainous character; for instance, Professor Bourquin said on October 5th:

> ' The shore involved in the dispute is an abrupt coast towering high above the level of the sea; that fact is of great importance to our case. It is therefore a coast which can be seen from a long way off. A mariner approaching from the sea catches sight of a mountainous coast, like this of Norway, very soon. From this point of view a coast like this of Norway cannot be compared with a flat coast such as that, for example, of the Netherlands.'

" The Norwegian argument also repeatedly insists that the base-lines of the Decree of 1935 have been so drawn that the land is visible from every point on the outer line. I am unable to see the relevance of this point because I am aware of no principle or rule of law which allows a wider belt of territorial waters to a country possessing a mountainous coast, such as Norway, than it does to one possessing a flat coast, such as the Netherlands.

" In brief, for the following reasons, I am unable to reconcile the Decree of 1935 with the conception of territorial waters as recognized by international law—

" (*a*) because the delimitation of territorial waters by the Decree of 1935 is inspired, amongst other factors, by the policy of protecting the economic and other social interests of the coastal State;

" (*b*) because, except at the precise 48 base-points, the limit of four miles is measured not from land but from imaginary lines drawn in the sea, which pay little, if any, attention to the closing lines of lawfully enclosed indentations such as fjords, except Varangerfjord and Vestfjord ;

" (*c*) because the Decree of 1935, so far from attempting to delimit the belt or *bande* of maritime territory attributed by international law to every coastal State, comprises within its limits areas of constantly varying distances from the outer line to the land and bearing little resemblance to a belt or *bande* ;

" (*d*) because the Decree of 1935 ignores the practical need experienced from time to time of ascertaining, in the manner customary amongst mariners, whether a foreign ship is or is not within the limit of territorial waters.

" (C) That the United Kingdom is precluded from objecting to the Norwegian system embodied in the Decree of 1935 by previous acquiescence in the system.

" Supposing that so peculiar a system could, in any part of the world and at any period of time, be recognized as a lawful system of the delimitation of territorial waters, the question would arise whether the United Kingdom had precluded herself from objecting to it by acquiescing in it. An answer to that question involves two questions :

" When did the dispute arise ?

" When, if at all, did the United Kingdom Government become aware of this system, or when ought it to have become aware but for its own neglect ; in English legal terminology, when did it receive actual or constructive notice of the system ?

" When did the dispute arise ? Three dates require consideration : 1906, 1908 and 1911. I do not think it greatly matters which we take. As for 1906, Chapter IV of the Counter-Memorial is entitled ' History of the Dispute since 1906 '. The Storting Document No. 17/1927 (to be described later) says (p. 122) that ' in 1905 English trawlers began to fish in the waters along northern Norway and Russia ', and the Counter-Memorial, paragraph 91, states that ' British trawlers made their first appearance off the coast of Eastern Finnmark towards 1906 '. Some apprehension occurred among the local population. A Law of June 2, 1906, prohibiting foreigners from fishing in Norwegian territorial waters, was passed, and ' since 1907, fishery protection vessels have been stationed every year in the waters of Northern Norway ' (*ibidem*, paragraph 93).

" As for 1908, Norwegian Counsel told the Court (October 25) that ' as early as 1908 Norway organized its fishery patrol service on the basis of the very lines which were subsequently fixed in the 1935 Decree '. It is strange that these lines were not communicated to the United Kingdom in 1908. According to Annex 56 of the Counter-Memorial, a Report made by the General Chief of Staff of the Norwegian Navy,

> ' The instructions given to the naval fishery protection vessels as early as 1906 specified two forms of action to be taken in regard to trawlers : warning and arrest.
>
> ' The first warning, after the trawlers had begun to visit our Arctic waters, was given in the summer of 1908 to the British trawler *Golden Sceptre*.'

" As for 1911, on March 11th of that year, when the British trawler *Lord Roberts* was arrested in Varangerfjord and the master was fined for breach of the Law of 2nd June, 1906, Notes were exchanged between the British and Norwegian Governments and the Norwegian Foreign Minister had an interview with Sir Edward Grey, the British Foreign Minister, in London. At that interview, the Norwegian Minister, M. Irgens, ' insisted on the desirability of England not at that moment lodging a written protest ' (*ibidem*, paragraph 98 *a*), but on the 11th July, 1911, the British Government sent a protest to Norway (Counter-Memorial, Annex 35, No. 1), in which they maintained that they had

Case No. 36 *Contd.*

' never recognized the Varanger and the Vest fjords to be territorial waters, nor have they participated in any international agreement for the purpose of conferring the right of jurisdiction beyond the three-mile limit off any part of the Norwegian coasts '. On October 13th, 1951, Mr. Arntzen said in the course of his oral argument :

> ' The Norwegian Government is happy to see the dispute which has lasted so long submitted for the decision of the International Court of Justice. I think it may be relevant to recall that M. Irgens, the Norwegian Foreign Minister, at the time of his discussions [that is, in 1911] with Sir Edward Grey concerning the *Lord Roberts* incident in 1911, was already speaking of the possibility of arbitration as a solution to the dispute.'

" In later years many other trawlers were arrested, and the dispute widened, but it was not until during the course of these proceedings that the United Kingdom admitted that the waters of Varangerfjord within the line claimed by Norway were Norwegian waters.

" Between the arrest of the *Lord Roberts* in 1911 and May 5th, 1949, sixty-three British and other fishing vessels were arrested for fishing in alleged Norwegian waters, and many others were warned (see Counter-Memorial, Annex 56).

" I must now examine the Decrees on which the Decree of 1935 purports to be based and some of which have been mentioned as evidence that the United Kingdom had acquired or ought to have acquired notice of the Norwegian system before the dispute began.

" (i) *The Royal Decree of February 22nd*, 1812. The Storting Document No. 17/1927 tells us (pp. 506, 507) that after discussion between the Admiralty and Foreign Office of the Kingdom of Denmark-Norway, it was decided to request the King for a royal resolution and the Chancellery defined the matter to be

> ' whether the territorial sovereignty, or the point from which the sovereign right of protection is fixed, shall be measured from the mainland or from the extremest skerries '.

" Thereupon the King of Denmark and of Norway made the Decree, of which a translation will be found on page 134 of the Judgment of the Court. The Decree makes no mention of straight lines between islands or islets, or of connecting headlands of the mainland by any lines at all.

" This is the first of the Decrees mentioned in the preamble as the basis of the Decree of 1935, and it has been treated by the Norwegian Agent and Counsel as the basis and the starting-point of a series of Decrees made in the 19th century and of the Decree of 1935—a kind of *Magna Carta*. The Judgment of the Court attributes ' cardinal importance ' to it. It therefore deserves close examination. For this purpose, I must refer again to Storting Document No. 17/1927, which is a Report made by one section of the ' Enlarged Committee on Foreign Affairs and Constitution of the Norwegian Storting ' in April 1927, later translated into English and then printed and published by Sijthoff in Leyden in 1937, under the title of *The Extent of Jurisdiction in Coastal Waters*, by Christopher B. V. Meyer, Captain, Royal Norwegian Navy.

" On pages 492 ff., this document passes under review a large number of 17th and 18th-century Decrees and Proclamations, amongst others that of June 9, 1691 (Annex 6, I, to the Counter-Memorial), and another of June 13, 1691 (Annex 6, II) which, it will be noticed, refers to the area between the Naze in Norway and the Jutland Reef. It then refers to the Decree of 1812 and tells us that it was ' not in reality intended to be more than a regulation for the actual purpose : prize cases on the southern coasts '. Further, on page 507, we are told that the Royal Resolution ' was communicated . . . to all the Governors in Denmark and Norway whose jurisdictions border the sea, all the prize courts in

Denmark and Norway and the Royal Supreme Admiralty Court '. It was communicated ' for information ' with the additional order : ' yet nothing of this must be published in printing '.

" Page 507 contains the following footnote :

> ' ( ) N.R.A. Chanc., drafts. As far as is known, the resolution was printed for the first time in 1830 in *Historisk underretning om landvaernet* by J. Chr. Berg. Dr. Ræstad states that up to that time it was little known and apparently no appeal was made to it previously, either in Denmark or in Norway.'

" Then follow several quotations from Dr. Ræstad's *Kongens Strömme*, commenting on the expression ' in all cases ', which should be noted because his interpretation of ' in all cases ' differs from that about to be quoted from this document, and because Dr. Ræstad stated that, though the Decree of 1812 ' was intended for neutrality questions ', ' the one-league limit at that time was the actual limit—at any rate the actual minimum limit—also for other purposes than for neutrality '. We are then told (p. 509) that

> ' in the light of the most recent investigations it seems quite clear that the term " in all cases " only means " in all prize cases ". The Resolution of 22nd February, 1812, only completed the foregoing neutrality rescripts by deciding the question which was left open in 1759 : whether the league should be measured from *terra firma* or from the appurtenant skerries, etc. The one-league limit of 1812 had, therefore, no greater scope than the one-league limit mentioned in the previous Royal Resolutions of the 18th century, that is to say, it applied only to neutrality questions, and was laid down only for the guidance of national authorities, not of foreign Powers.'

" The relevance of these passages is that they shew :

" (*a*) that the Decree of 1812 was little known for some 18 years ;
" (*b*) that it was intended for administrative purposes and not for the guidance of foreign States ;
" (*c*) that, in the opinion of some people, it only applied to prize cases and even then, according to this document, only to prize cases on the southern coasts. On page 510 the Report speaks of ' the prize case rule of 22nd February, 1812 '.

" It is clear that between 1869 and 1935 ' the prize case rule of 22nd February, 1812 ' was acquiring a wider connotation, as we shall now see.

" It does not matter whether the views expressed in the Storting Document No. 17/1927 as to the meaning of the Royal Decree of 1812 are right or wrong. What is important from the point of view of the alleged notoriety of the Norwegian system is that such views as to the true import of the Decree of 1812 and its connection with the Norwegian system could be held by responsible persons in Norway as late as the year 1927.

" (ii) The *Les Quatre Frères* incident of 1868. This French fishing boat was turned out of the Vestfjord by the Norwegian authorities. The French Government protested on the ground that the Vestfjord was not part of Norwegian territorial waters and ' serves as a passage for navigation towards the North '. Correspondence between the two Governments ensued, and the Minister of Foreign Affairs of Norway and Sweden on November 7th, 1868, claimed Vestfjord ' as an interior sea ', which appears to have closed the incident.

" (iii) *A Royal Decree of October 16th*, 1869, provided

> ' That a straight line drawn at a distance of 1 geographical league parallel to a straight line running from the islet of Storholmen to the island of Svinöy shall be considered to be the limit of the sea

Case No. 36 *Contd.*

belt for the coast of the Bailiwick of Sunnmöre, within which the fishing shall be exclusively reserved to the inhabitants of the country.'

" This, according to Professor Bourquin (October 6) was the first application of the Decree of 1812 to fishing. The straight base-line connecting the two islands above mentioned was 26 miles in length.

" The Counter-Memorial contains in Annex 16 a Statement of Reasons submitted by the Minister of the Interior to the Crown dated October 1st, 1869, about which a few very much compressed comments must be made. Firstly, it represents the cry of the small man in the open boat against the big man in the decked boat. It says that the area in question ' has of recent years been invaded by a growing number of decked vessels, both Swedish and Norwegian cutters, from which fishing was practised with heavy lines ', etc. Apparently the Swedes began it in 1866 and the Norwegians followed suit. Another passage states that the local fishermen ' bitterly complained of the fact that intruders on the fishing grounds previously visited exclusively by Norwegians were mainly foreigners—Swedes '. The fear was also expressed that fishing boats from other countries, especially France, might soon appear on the fishing banks. Accordingly, the Minister had been asked ' to form an opinion on the possibility of claiming them as Norwegian property '. (The reference to France was probably prompted by the Vestfjord incident of the previous year which would be fresh in the departmental mind.)

" The Statement of Reasons invokes the precedent of the Decree of 1812. In addition, there is a letter of November 1st, 1869 (Annex No. 28 to the Counter-Memorial), from the Norwegian Minister of the Interior to the Swedish Minister of Civil Affairs, informing him of the Decree made on the 16th instant (? ultimo), and it contains the passage : ' it has been desired to bring this matter to the notice of the Royal Ministry in order that the latter may publish the information in those Swedish districts from which the fishing fleets set out for the Norwegian coast '. (There is no evidence of any notification of the Decree to any other State.) The penultimate sentence in this letter is as follows :

> ' Moreover, if the fishery in these areas were left open, there is reason to believe that the fishermen of many foreign countries would visit them, with the result of a diminution of the products of the fishery for everybody.'

" The Decree was a public document. A large part of the Statement of Reasons is quoted in the Norwegian Report of a Commission on the Delimitation of Territorial Waters of 1912, but, so far as I am aware, the Statement of Reasons was not published at the time of making the Decree.

" The French Government—probably on the *qui-vive* by reason of the Vestfjord incident of the previous year—became aware of the Decree of 1869 two months later and a diplomatic correspondence between the two Governments ensued, in which the French Government contended that ' the limits for fishing between [Svinöy and Storholmen] should have been a broken line following the configuration of the coast which would have brought it nearer that coast than the present limit '. The last item in this correspondence is a Note from the French Chargé d'Affaires at Stockholm to the Foreign Minister of Norway and Sweden, dated July 27, 1870, which referred to ' the future consequences . . . that might follow from our adhesion to the principles laid down in the Decree ', and stated that ' this danger . . . could easily be avoided if it were understood that the limit fixed by the Decree of October 16th does not rest upon a principle of international law, but upon a practical study of the configuration of the coasts and of the conditions of the inhabitants ', and offered to recognize the delimitation *de facto* and to join in ‘ a common survey of the coasts to be entrusted to two competent naval officers ’. It would appear that the French Government wished to protect itself against a *de jure* recognition of principle. Meanwhile, on July 19, the Franco-Prussian war had broken out, and there the matter has rested ever since.

“ (iv) *A Royal Decree of September 9th*, 1889, extended the limit fixed by the Decree of 1869 northward in front of the districts of Romsdal and Nordmöre by means of a series of four straight lines, connecting islands, totalling about 57 miles, so that the two Decrees of 1869 and 1889 established straight base-lines of a total length of about 83 miles. The Decree of 1889 was also motivated by a Statement of Reasons submitted by the Minister of the Interior to the Crown, which was included in a publication called *Departements-Tidende* of March 9, 1890. This Statement of Reasons, which also refers to the Decree of 1812, indicates the necessity of empowering the Prefect responsible for Nordmöre and Romsdal to make regulations prohibiting fishing boats from lying at anchor at certain points on the fishing grounds during February and March. It makes no reference to foreign vessels.

“ The question thus arises whether the two Decrees of 1869 and 1889, affecting a total length of maritime frontier of about 83 miles, and connecting islands but not headlands of the mainland, ought to have been regarded by foreign States when they became aware of them, or ought but for default on their part to have become aware, as notice that Norway had adopted a peculiar *system* of delimiting her maritime territory, which in course of time would be described as having been from the outset of universal application throughout the whole coast line amounting (without taking the sinuosities of the fjords into account) to about 3,400 kilometres (about 1,830 sea-miles), or whether these Decrees could properly be regarded as regulating a purely local, and primarily domestic, situation, I do not see how these two Decrees can be said to have notified to the United Kingdom the existence of a system of straight base-lines applicable to the whole coast. In the course of the oral argument, Counsel for the United Kingdom admitted that the United Kingdom acquiesced in the lines laid down by these Decrees as lines applicable to the areas which they cover.

“ (v) *A Decree of January 5th*, 1881, prohibited whaling during the first five months of each calendar year

> ‘ along the coasts of Finnmark, at a maximum distance of one geographical league from the coast, calculating this distance from the outermost island or islet, which is not covered by the sea. As regards the Varangerfjord, the limit out to sea of the prohibited belt is a straight line, drawn from Cape Kibergnes to the River Grense-Jakobselv. It must thereby be understood, however, that the killing or hunting of whales during the above-mentioned period will also be prohibited beyond that line at distances of less than one geographical league from the coast near Kibergnes.’

“ Thus, while expressly fixing a straight base-line across the mouth of the Varangerfjord (which is no longer in dispute in this case), the Decree makes no suggestion and gives no indication that it instituted a system of straight base-lines from the outermost points on the mainland and islands and rocks at any other part ‘ along the coasts of Finnmark’. I find it difficult to see how this Decree can be said to have given notice of a Norwegian system of straight base-lines from Træna in the west to the Russian frontier in the east.

“ (vi) *The* 1881 *Hague Conference regarding Fisheries in the North Sea resulting in the Convention of* 1882. The Judgment of the Court refers to this incident and draws certain conclusions from it. This Conference was summoned upon the initiative of Great Britain with a view to the signature of a Convention as to policing the fisheries in the

North Sea. The following States were represented : Germany, Belgium, Denmark, France, Great Britain, Sweden, Norway, the delegate of the last-named being M. E. Bretteville, Naval Lieutenant and Chief Inspector of Herring Fishery. The intention was that the Convention should operate on the high seas and not in territorial waters, and consequently it was necessary to define the extent of the territorial waters within the area affected. The procès-verbaux of the meetings are to be found in a British White Paper C. 3238, published in 1882.

" The northern limit of the operation of the Convention was fixed by Article 4 at the parallel of the 61st degree of latitude, which is south of the area in dispute in this case.

" At the second session of the Conference, the question of Territorial Waters was discussed, and the following statement appears in the procès-verbaux :

> ' The Norwegian delegate, *M. E. Bretteville*, could not accept the proposal to fix territorial limits at 3 miles, particularly with respect to bays. He was also of opinion that the international police ought not to prejudice the rights which particular Powers might have acquired, and that bays should continue to belong to the State to which they at present belong.'

" Strictly speaking, there was no need for the Norwegian delegate to refer to the Decree of 1869 because the Convention deals with the area south of the parallel of the 61st degree of latitude, but if a system of straight base-lines had already been adopted by Norway in 1881 as being of general application all round the coast, it is surprising that he made no reference to it at a Conference at which all the States primarily interested in fishing in the North Sea were represented, and as a result of which all, except Norway and Sweden, accepted the provisions of Article II of the Convention, of which the following is an extract :

> ' *Article II*
>
> ' The fishermen of each country shall enjoy the exclusive right of fishery within the distance of 3 miles from low-water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks.
>
> ' As regards bays, the distance of 3 miles shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed 10 miles.'

" The Convention was eventually signed and ratified by all the States represented except Norway and Sweden.

" This incident, to which I attach particular importance, induces me to put two questions :

" (*a*) If a Norwegian system of delimiting territorial waters by means of straight base-lines had been in existence since 1869 (only 12 years earlier), could the Norwegian delegate, the Chief Inspector of Herring Fishery, have found a more suitable opportunity of disclosing its existence than a Conference of Governments interested in fishing in the North Sea ? In fact, could he have failed to do so if the system existed, for it would have afforded a conclusive reason for inability to participate in the Convention of 1882 ?

" (*b*) Could any of the Governments which ratified this Convention, knowing that Norway claimed four miles as the width of territorial waters and claimed her fjords as internal waters, be affected by the abstention of Norway with notice of the existence of a system which one day in the future would disclose long straight base-lines drawn along a stretch of coast line about 560 miles in length (without counting fjords and other indentations), and which is applicable to the whole coast ?

. . . . . .

" Paragraph 96 of the Counter-Memorial, in discussing the events of the year 1908, states that

> ‘ it may be asked why Norway did not from the beginning use force on all her territorial waters to apply the existing laws relating to foreign fishermen ’. . . . ‘ In this respect it must be remembered that Norway had but recently acquired a separate diplomatic service, following the dissolution of the union with Sweden in 1905.’

It is possible that this fact may explain the absence of any categorical assertion of the Norwegian system of straight base-lines as a system of universal application along the Norwegian coasts and the notification of that system to foreign States. But even if this is the explanation, it is difficult to see why it should constitute a reason why foreign States should be affected by notice of this system and precluded from protesting against it when it is enforced against them. . . .

“ In these circumstances, I do not consider that the United Kingdom was aware, or ought but for default on her part to have become aware, of the existence of a Norwegian system of long straight base-lines connecting outermost points, before this dispute began in 1906 or 1908 or 1911. . . .

“ I must refer very briefly to certain incidents occurring after the dispute began, though they have no bearing on the question of acquiescence. Some of them are dealt with in the Judgment of the Court or in other Individual Opinions.

“ In 1911, the Norwegian Government appointed a ‘ Commission for the Limits of Territorial Waters in Finnmark ’, which reported on February 29th, 1912. A copy of Part I, General, was translated into French and sent ‘ unofficially ’ to the United Kingdom Government.

“ The following passage occurs on page 20 of this Part I :

> ‘ En général, dans les cas particuliers, on prendra le plus sûrement une décision en conformité avec la vieille notion juridique norvégienne, si l’on considère la ligne fondamentale comme étant tirée entre les points les plus extrêmes dont il pourrait être question, nonobstant la longueur de la ligne.’

“ This is clearly the language of a proposal. The tenses of the verbs should be noted.

“ On the same day, ‘ the Commission presented Report No. 2 “ Special and Confidential Part ”, containing proposals for the definite fixing of base-lines around Finnmark ’ (Counter-Memorial, paragraph 104). In 1913 a confidential Report was made upon the proposed base-lines on the coasts of the two other provinces concerned, Nordland and Troms (*ibidem*, paragraph 105). It appears (*ibidem*) that the base-points proposed in these confidential Reports are those ultimately adopted by the Decree of 1935 ; the confidential Reports were not disclosed until 1950 when they appeared as Annexes 36 and 37 of the Counter-Memorial.

“ The Judgment of the Court refers to the Judgment of the Supreme Court of Norway in the *St. Just* case in 1934, in which that British vessel was condemned for fishing in territorial waters under the Law of 1906. It is clearly a decision of high authority. From 1934 onwards, it is conclusive in Norway as to the meaning of the Decree of 1812 and as to its effect, whether or not it has been specifically applied to portions of the coast by later Decrees. But this Court, while bound by the interpretation given in the *St. Just* decision of Norwegian internal law, is in no way precluded from examining the international implications of that law. It is a well-established rule that a State can never plead a provision of, or lack of a provision in, its internal law or an act or omission of its executive power as a defence to a charge that it has violated international law. This was decided as long ago as in the Geneva Arbitration of 1870–1871 on the subject of the *Alabama Claims*, when the British Government pleaded that it had exercised all the powers possessed by it under its existing legislation for the purpose of

Case No. 36 *Contd.*

preventing the *Alabama* from leaving a British port and cruising against Federal American shipping, an omission which cost Great Britain a large sum of money.

" The *St. Just* decision is important in the sense that, after the decision, the existence of a Norwegian system of straight base-lines cannot be denied either within Norway or on the international plane. Only eight years earlier there had occurred the *Deutschland* case (a case of an attempt by a German vessel to sell contraband spirits) (Annex 9 to the Memorial and Annex 47 to the Counter-Memorial and Annex 31 to the Reply), in which the Norwegian Supreme Court, by a majority of 5 to 1, quashed a conviction by an inferior Court which had been upheld by the Court of Appeal. In the *Deutschland* case, which has now been overruled by the *St. Just*, it was possible for so distinguished a Norwegian jurist as the late Dr. Ræstad (much quoted by both Parties in this case) to say in the Opinion supplied by him at the request of the Public Prosecutor that :

> ' The question arises, however, whether in the present case the extent of the maritime territory must be determined from islands, islets and isolated reefs, or—as the Court of First Instance has done—from imaginary base-lines drawn between two islands, islets or reefs and, if necessary, how these base-lines are to be drawn. A distinction must be made here. On the one hand, the problem arises whether according to international law a State is entitled to declare that certain parts of the adjoining sea fall under its sovereignty in certain—or all—respects. On the other hand, the question may arise whether a State under international law, or by virtue of its own laws, is entitled to consider that its national legislation in the determined case extends to these same parts of the adjoining sea when it has not yet been established that its sovereignty extends that far. A State may have a certain competence without having made use of it.'

and later

> ' Neither the letters patent [that is, in effect, the Decree of 1812] nor, if they exist, the supplementary rules of customary law, prescribe how and between what islands, islets or rocks the base-lines should be drawn. . . .'

" It does not greatly matter whether Dr. Ræstad's views are right or wrong. What is important, from the point of view of the notoriety of the Norwegian system of straight base-lines, is that, in the year 1926, a lawyer of his standing and possessing his knowledge of the law governing Norwegian territorial waters should envisage the possible alternative methods of drawing base-lines, for the Norwegian contention is that the United Kingdom must for a long time past have been aware of the Norwegian system of straight base-lines connecting the outermost points on mainland, islands and rocks, and had acquiesced in it.

" The following passage occurs in the *Deutschland* case in the Judgment of Judge Bonnevie, who delivered the first judgment as a member of the majority :

> ' It is also a matter of common knowledge that the public authorities have claimed, since time immemorial, certain areas, such as for example the Vestfjord and the Varangerfjord, as being Norwegian territorial waters in their entirety, and that the territorial limits should be drawn on the basis of straight lines at the mouth of the fjord (*sic*), regardless of the fact that very great areas outside the four-mile limit are thus included in Norwegian territory. But, for the greater part of the extensive coast of the country, no documents have been produced to prove that there exist more precise provisions, except for the coast off the county of Möre, for which reference is made to the two royal decrees of 1869 and 1889 referred to above.'

"Between 1908 and the publication of the Decree of 1935, the United Kingdom repeatedly asked the Norwegian Government to supply them with information as to their fishery limits in northern Norway; see the Report of the Foreign Affairs Committee of the Storting dated June 24th, 1935 (Memorial, Annex 15), which states that 'The British Government have repeatedly requested that the exact limit of this part of the coast should be fixed so that it might be communicated to the trawler organizations'. The Norwegian reply to these requests has been that the matter was still under consideration by a Commission or in some other way, e.g., in the letter of August 11th, 1931, from the Norwegian Ministry of Foreign Affairs, 'the position is that the Storting have not yet taken up a standpoint with regard to the final marking of these lines in all details'.

"The impression that I have formed is that what in the argument of this case has been called 'the Norwegian system' was in gestation from 1911 onwards, that the *St. Just* decision of 1934 (overruling the *Deutschland* decision) marks its first public enunciation as a system applicable to the whole coast, and that the Decree of 1935 is its first concrete application by the Government upon a large scale. I find it impossible to believe that it was in existence as a system at the time of the *Deutschland* decision of 1926.

"(D) Another ground upon which Norwegian counsel have sought to justify the Decree of 1935 is that in any case the waters comprised within the outer lines fixed by that Decree lie well within the ancient fishing grounds of Norway to which she acquired a historic title a long time ago.

"I think it is true that waters which would otherwise have the status of high seas can be acquired by a State by means of historic title, at any rate if contiguous to territorial or national waters; see Lord Stowell in *The Twee Gebroeders* (1801), 3 Christopher Robinson's Admiralty Report 336, 339. But, as he said in that case:

> 'Strictly speaking, the nature of the claim brought forward on this occasion is against the general inclination of the law; for it is a claim of private and exclusive property, on a subject where a general, or at least a common use is to be presumed. It is a claim which can only arise on portions of the sea, or on rivers flowing through different States. . . . In the sea, out of the range of cannon-shot, universal use is presumed. . . . Portions of the sea are prescribed for. . . . But the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established, on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated, by clear and competent evidence.'

"Another rule of law that appears to me to be relevant to the question of historic title is that some proof is usually required of the exercise of State jurisdiction, and that the independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of a licence or some other authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them.

"When the documents that have been submitted in this case in support of historic title are examined, it appears to me that, with one exception which I shall mention, they are marked by a lack of precision as to the waters which were the subject of fishing. We get expressions such as 'near our fortress of Varshus', 'off the coasts of Finnmark', 'the waters off the coast of this country', 'near the land', 'fish quite close to the coast', 'unlawful fishing which they have been practising in certain localities', 'the waters of Finnmark', 'fjords or their adjacent waters ', ' whaling in the waters which wash the coast of Norway and its provinces, in particular Iceland and the Faroe Islands ', etc., etc.

" The exception is the case of the licences granted to Eric Lorch in the seventeenth century (see Annex 101 to Norwegian Rejoinder). In 1688 he received a licence to fish in, amongst other places, ' the waters . . . of the sunken rock of Gjesbaen ' ; in 1692 he received a licence to hunt whales ; in 1698 he received another licence to hunt whales, which mentions, among other places, ' the waters . . . of the sunken rock of Gjesbaen '. The last two licences state that it is forbidden to ' all strangers and unlicensed persons to take whales in or without the fjords or their adjacent waters, within ten leagues from the land '.

" I do not know precisely where the *rock* called Gjesbæn or Gjesbæne is situated, beyond the statement in paragraph 36 of the Counter-Memorial that it is ' near the word Alangstaran ', which is marked on the Norwegian Chart 6 (Annex 75 to the Rejoinder) as being *outside* the outer Norwegian line of the Decree of 1935. On the same chart of the region known as Lopphavet there appear to be two fishing-banks called ' Ytre Gjesboene ' and, south of it, ' Indre Gjesboene ', the former being outside the outer line of the Decree of 1935 and the latter between the outer line and the base-line of that Decree. What the dimensions of the fishing-banks are is not clear. The length of the base-line (from point 20 to 21) which runs in front of Lopphavet is 44 miles, so that even if the licences formed sufficient evidence to prove a historic title to a fishing-bank off ' the sunken rock of Gjesbæn ', they could not affect so extensive an area as Lopphavet. The three licences cover a period of ten years and there is no evidence as to the duration of the fishery or its subsequent history.

" In these circumstances I consider that the delimitation of territorial waters made by the Norwegian Decree of 1935 is in conflict with international law, and that its effect will be to injure the principle of the freedom of the seas and to encourage further encroachments upon the high seas by coastal States. I regret therefore that I am unable to concur in the Judgment of the Court."

Judge Read delivered a Dissenting Opinion which is, in part, as follows :

". . . I have no doubt that the Coast-Line Rule is an established rule of international law.

" The collapse of the claims to maritime domain, based on *mare clausum* and similar doctrines—including those asserted by the Kingdom of Denmark and Norway—brought about the regime of *mare liberum*, the freedom of the seas, under which the seas were open to all men of all nations for all purposes. Pressure of belligerents in naval warfare destroyed the older pretensions ; but the needs of defence and neutrality led States, even under the new regime, to assert new exclusive rights over belts or zones based on the coast.

" The recognition of such zones by belligerents was closely linked with the power of the coastal State to exercise effective control, and it was, at the outset, restricted to areas within cannon range of fortified points. In time, it was extended to cover all areas capable of being covered by cannon shot, whether they were fortified or not. It was an easy step from the range of cannon to the 3-mile limit : a belt of territorial waters 1 marine league in breadth, subject to the exclusive authority of the coastal State and from which foreign belligerent operations were excluded. Some countries have claimed wider zones or more extensive areas ; but, for a very long time, none has disputed the right of a coastal State to assert sovereignty over a belt of territorial waters measured from the coast.

" In the course of the 19th century, it became necessary to give further consideration to bays. The establishment of a belt of territorial waters measured from the coast met most of the needs of coastal States as regards defence and security. Such waters were in their very nature part of the sea. Bays, however, presented a special problem. They penetrated into the country, and were largely enclosed by their headlands. The application of the concept of a belt of territorial waters of fixed breadth to larger bays would bring the sea, both high seas and territorial sea, into the heart of the country. It would treat waters which were in their nature internal, as part of the open sea, and it would bring smugglers and foreign warships and fishermen into the interior of the coastal State, to the prejudice of its security and vital interests. The solution of this problem developed along two different lines.

" First : there was a tendency to recognize the right of the coastal State to claim as internal waters bays which penetrated the coast, notwithstanding that the distance between the headlands was greater than double the breadth of the marginal belt, e.g., more than 6 or 8 miles. The records of State practice embodied in the documents prepared for the Hague Conference, 1930, indicated that there was a readiness on the part of most States to recognize such claims over bays not more than 10 miles wide.

" There were, however, maritime Powers which asserted the right to claim as internal waters bays of greater breadth, or even to claim all bays regardless of the distance between headlands ; but there was no indication that such wider claims were recognized by the international community. Further, there were some States which adhered to a six-mile limit.

" Second : it was recognized that, regardless of breadth, the coastal State could treat as internal waters those bays over which they had exercised sovereignty, without challenge, for a long time. This is the doctrine of historic waters, and it is not confined to bays, but can be applied to the assertion of rights over historic waters which do not possess all the characteristics of a bay. The rights of the coastal State are, in this case, fully supported by customary law.

" As regards these three types of waters—the belt of territorial waters, 10-mile bays and historic waters—there is no instance in which the claim of a coastal State has been successfully challenged since the North Atlantic Fisheries Arbitration. They can, therefore, all be regarded as established by rules of customary international law. Whether or not claims to bays of greater breadth can be supported, apart from historic factors, is a question which does not need to be considered in this case. It should also be noted that, in the case of all types of bays or historic waters, the marginal belt of territorial waters is measured from the outer limit of the internal waters.

" In this case Norway is asserting the right to measure the 4-mile belt, not from the coast line, but from long straight base-lines. These lines depart from the line of the coast in Eastern Finnmark, and from the line of the outer fringe of the ' skjærgaard ' between the North Cape and the Vestfjord. The Court is concerned with this question :

> —whether customary international law recognizes the right of a coastal State to use straight base-lines for the delimitation of its belt of territorial waters in such a manner as to depart from the line of the coast, and to encroach upon the high seas, thus depriving other States of rights and privileges to which they had previously been entitled under the rules of international law.

" It has been contended that such a claim can be derived from the sovereignty of the coastal State, but I do not see how this can be.

Case No. 36 *Contd.*

Here, we are not dealing with the exercise, by a State, of sovereignty within its domain. We are dealing with State action which extends its domain, and purports to exclude all other States from areas of the high seas. We are dealing with expansion of the maritime domain designed to deprive other States of rights and privileges which, before the extension, they were entitled to enjoy and exercise, under the rules of international law.

" In these circumstances, I should have much difficulty in justifying the Norwegian system as an exercise of powers inherent in State sovereignty.

" The question remains : whether action by a State, encroaching on the high seas and depriving other States of their rights and privileges, can be justified by customary international law.

" The true legal character of the problem has been obscured. It has been treated as if the issue concerned the existence or non-existence of a rule of customary international law restricting the exercise of sovereign power by coastal States. It has been assumed that the United Kingdom must establish the existence of such a restrictive rule in order to challenge the validity of the 1935 Decree. It has been suggested that the British case must fail, unless it can be proved that such a restrictive rule is founded on customary international law.

" The actual legal problem with which we are concerned is different. By the Decree of 1935, Norway has attempted to enlarge the Norwegian maritime domain and to encroach on extensive areas of the high seas, and has seized and condemned foreign ships. Accordingly, we must consider whether such a course is justified. Disregarding, for the time being, the historic factor, we must begin by examining the extent of the power to delimit its maritime domain, given to a coastal State by international law.

" Here, I have no doubt about the position. The power of a State to delimit its maritime domain is the same as its power to delimit any other part of its domain. It can extend its domain in any way that does not impair the rights of other States or of the international community : e.g., it can occupy no man's land, *res nullius* ; or it can annex occupied territory, with the consent of the territorial sovereign. It cannot go beyond the territorial limits of its existing sovereignty, if such a course impairs rights or privileges conferred on other States by international law.

" No question of *res nullius* or annexation arises in the case of the sea. All nations enjoy all rights and all privileges in and over all of the sea beyond the limit of territorial waters. It follows that the power of a coastal State to mark out its maritime domain cannot be used so as to encroach on the high seas and impair these rights and privileges. Its power is limited to the marking out of areas already subject to its sovereignty.

" Accordingly, it is necessary to examine the actual extent of Norwegian territorial waters, as recognized by customary international law before the making of the 1935 Decree. It certainly consisted of a belt of territorial waters 4 sea miles in breadth : but the question is to determine the starting points from which the belt should be measured.

" Few States have marked out their maritime domains, and the course followed by Norway, in 1869, 1881, 1889 and 1935, was unusual. In general, the matter has been left to national courts, to prize courts, to arbitral tribunals and to diplomatic procedures in the innumerable cases which have arisen and which have been dealt with in the practice of States. Over the last century and a half, there have been many hundreds of cases in which foreign ships have been seized by the authorities of coastal States. They have arisen in naval war, in smuggling, in fisheries protection and in other matters. They have given rise to legal problems, national and international. The demarcation of territorial waters or of customs zones or the establishment of the distance from the coast has nearly always been in issue, and has been decided by national courts or international tribunals, or settled by diplomatic negotiations. In naval war, instructions have been given to commanders, and seizures have been dealt with by prize courts.

" Customary international law is the generalization of the practice of States. This cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships. Such claims may be important as starting points, which, if not challenged, may ripen into historic title in the course of time.

" The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration.

" Here, it is necessary to rule out seizures made by Norway at and since the commencement of the dispute. They met with immediate protest by the United Kingdom, and must, therefore, be disregarded. Seizures made in bays need not be taken into account, because it is common ground that coastal States may measure the belt of territorial waters from straight base-lines joining the headlands of bays.

" Setting aside these instances which are irrelevant to the present issue, State practice may be examined. To begin with, the Record in this case shows that Norway has maintained a four-mile limit for territorial waters since 1745. For part of the time this was used only for neutrality and prize ; but, for much of the time, it was applied to fisheries. During the whole of the period since 1747 foreign fishermen have been fishing in the neighbourhood of the Norwegian coast ; Russians in the north, and, during the last eighty or ninety years, French and Swedish fishermen in the south. Further, there have been many naval wars in which Norway was neutral, and the Record shows that infringements of neutrality and incursions of privateers were a serious menace to the country. It is noteworthy that there is not a single instance in which Norway asserted sovereignty in any of the Disputed Areas—or, indeed, over waters measured from long base-lines in other parts of the country—by seizing a foreign poaching fisherman or by action taken against a trespassing privateer, prize or man-of-war.

" The same situation obtains in the case of other coastal States. No instance has been cited by either Party in which a coastal State has seized a foreign ship and justified and maintained the seizure, on the international plane, by relying on long base-lines departing from the direction and sinuosities of the coast. It has been a universal practice—in diplomatic negotiations, in prize courts, in national tribunals (in so far as they were applying international law) and in international tribunals—to rely upon the measurement of the territorial belt from the nearest land (or internal waters).

" There have been instances in which unsuccessful attempts have been made to justify seizures on the basis of long straight base-lines departing from the line and direction of the coast. There are the Moray Firth cases, in which seizures were upheld by the Courts on the authority of the local law, but in which the position thus asserted was abandoned on the international plane by the Government of the United Kingdom. There are also the cases cited in Moore (*International Law Digest*, ' The " Headland " Theory ', Vol. I, pp. 785–788), where attempts to justify seizures on this basis were frustrated, either in the course of diplomatic negotiation or by international tribunals.

" The practice of States in dealing with actual assertion and enforcement of claims over territorial waters is clear, unequivocal and consistent. It has been based upon the measurement of the territorial belt from the nearest land. I am compelled to conclude that ' The

Case No. 36 *Contd.*

Headland Theory ', the claim by a coastal State to a belt of territorial waters measured from long base-lines which depart from the line of the coast, has no support in customary international law.

" I do not think that the Court is called upon to pronounce upon the various methods by which hydrographers have worked out the limits of territorial waters on charts. I must, however, point out that the so-called ' arcs of circles method ' is nothing more or less than a technical expression, used to describe the way in which the coast-line rule has been applied in the international practice of the last century and a half.

" In the earliest days, the cannon on the coast, when traversed, traced arcs by the splash of their shots. Later, the imaginary cannon traced imaginary arcs which intersected and marked out the limit based on cannon shot. Then, as now, the imaginary cannon, mounted in minor concavities of the coast, were wasted, because their arcs were within the limits of the intersection of the shots from guns mounted at minor headlands. The substitution of the 3 or 4-mile limit made no difference. The fisherman, the smuggler, the master of the revenue cutter and the captain of the cruiser all fixed the limit of territorial waters by measurement from the nearest land. Innumerable national courts, international tribunals and prize courts settled the limits in the same way. Air patrols have followed the same course. All reached the same result ; and it did not make any difference where the problem arose or what was the nationality of the ships. What is more, all reached precisely the same result as a hydrographer gets, by drawing circles on a chart.

" Before turning to the historic aspect of the problem, I must deal with the Norwegian contention that, even if international law recognizes a Coast-Line Rule, it is not applicable to broken coast lines, or, in any event, not to the unique coast in question.

" It is unrealistic to suggest that the northern coast of Norway is unique or exceptional in that it has a broken coast line in East Finnmark, or because West Finnmark, Troms and Nordland are bordered by a coastal archipelago, deeply indented by fjords and sunds. In other parts of the world, different names are used, but there many other instances of broken coast lines and archipelagoes. The Court has seen the west coast of Scotland on the charts produced at the hearings. There are coastal archipelagoes, deeply indented bays and broken coast lines on the north, south, east and west coasts of Canada, in the panhandle of Alaska, in South America, and, doubtless, in other parts of the world. There could be no greater danger to the structure of international law than to disregard the general rules of positive law and to base a decision on the real or imaginary exceptional character or uniqueness of the case under consideration.

" I cannot overlook the fact that the rejection of ' The Headland Theory ' by positive international law was based, to a very large extent, on the precedents collected in Moore's *International Digest*, cited above. They arose on the coast of Nova Scotia and Prince Edward Island, a coast line deeply indented and broken by bays and other inlets, fringed in many places with groups of islands, rocks and reefs, a coast to which the terms ' exceptional ' and ' unique ' could readily be applied.

" I am therefore led to the conclusion that the rules of international law which, under comparable circumstances, are applicable to other countries in other parts of the world, must be applied to the coast of Norway.

" Having reached the conclusion that the Norwegian claim to measure its belt of territorial waters from long straight base-lines which depart from the line of the coast has no support in customary international law, it is necessary to consider the question of historic title. This aspect of the problem has arisen in two ways, both of which involve decisions on the same basic questions of fact. Both are related to the existence and application of the Norwegian System.

" The Norwegian System involves the assertion, by Norway, of sovereignty over all the fjords and sunds, and over a 4-mile belt of territorial waters, measured from base-lines connecting points on the mainland, or on the outermost islands, islets or rocks not continuously submerged by the sea. The System involves appreciation and selection of the base-points by Norway, taking into account the social and economic needs of the local population. There is no limitation on the length of the lines. On the other hand, it is recognized that they must be reasonable and that they must conform to the general direction of the coast. By general direction is meant a fictional direction related to the country as a whole, and not to the sector of the coast under consideration. The System does not admit of any need to conform to the real direction either of the outer fringe of the ' skjærgaard ' or of the mainland coast.

" The first way in which the historic aspect of the problem arises concerns the doctrine of historic waters. If it can be shown that the Norwegian System was actually applied to the Disputed Areas, they can be regarded as historic waters, and the British case fails.

" The second way in which it arises concerns the general doctrines of international law. If it can be shown that the Norwegian System has been recognized by the international community, it follows that it has become the doctrine of international law applicable to Norway, either as special or as regional law, and the British case fails.

" In both cases the burden is upon Norway to prove the following facts :

" 1st—that the Norwegian System came into being as a part of the law of Norway ;

" 2nd—that it was made known to the world in such a manner that other nations, including the United Kingdom, knew about it or must be assumed to have had knowledge ; and

" 3rd—that there has been acquiescence by the international community, including the United Kingdom.

" As regards the question of historic waters there is the additional point referred to above, namely, that it must be shown that the System was actually applied to the Disputed Areas. In the second case, treating the System as special or regional law, it would be enough to show that Norway had asserted competence to apply its provisions to the coasts of Norway in general, including the Disputed Areas. It would, however, be necessary to show that the 1935 Decree conformed to the requirements of the System.

" This case, therefore, turns on the date when the Norwegian System came into being, as a system : part of the public law of Norway ; applicable or applied to the coast in question ; known to the world ; and acquiesced in by the international community. . . ."

Judge Read then examined the question whether the system of straight lines was applied by Norway prior to the actual commencement of the dispute in 1931. (He gave a negative answer to this question (at pp. 195, 196).)

" Having dealt with the claim to the Disputed Areas as historic waters in the strict sense, the question remains : whether the Norwegian System can be treated as a doctrine of special international law, asserted by Norway, and recognized by the international community.

" For this purpose, it is not necessary to show that it was actually applied in the Disputed Areas before 1933 or 1935. It would be sufficient to prove that Norway had consistently and persistently asserted the right to apply the System to the Norwegian coast generally, and that there had been acquiescence in this claim by the international community.

"At the outset, I must explain that I do not regard the older historical data as important. I think that Norway has sufficiently proved that, at the close of the 18th century and under the international law of the time, Norway was asserting exclusive rights over a belt of waters which, as regards fishing rights, was based on the range of vision. This belt was much more extensive than that which was marked out by the 1935 Decree. The maritime domain, at that time and for fishing purposes, extended beyond the Blue Lines and certainly included nearly all of the Disputed Areas. These extensive Norwegian rights were not much different from the rights of other countries where exclusive fishing rights based on range of vision were recognized by the early international law.

"One might ask: how and when did Norway lose these rights? They disintegrated or fell into desuetude in Norway in the same manner as in other maritime countries. In Norway, as elsewhere, it is difficult to point to a particular decree or to special governmental action marking the end. It is, however, possible to point, with reasonable certainty, to the date.

"In the 18th century, the only foreigners engaged in fishing off the northern coast were Russians. They were excluded from a belt of waters 1 league from the coast; but were permitted to fish in what were then regarded as Norwegian waters beyond that limit, on payment of dues which covered both the fishing and shore privileges. These arrangements were based on diplomatic negotiations and on the Rescript of 1747.

"In the course of time, however, there was general recognition that the fishing by the Russians beyond the 4-mile limit was of right and not dependent on permission from the Norwegian authorities.

"The Royal Commission established in 1825–1826 to examine measures relating to the economic development of Finnmark looked upon the fishing beyond the 1-league limit as a special concession granted to the Russian fishermen. The Royal Legislative Commission took a different view and favoured the opinion that fishing beyond the 1-league limit was in principle free from restriction.

"The Finnmark Commission had proposed for incorporation in Article 40 of its draft proposal for a law relating to trade in both East and West Finnmark specific words which would have made it clear that the Russian fishing beyond the 1-league limit was permissive. These words were not included, and in Article 40 of the Law of 1830 the expression used read as follows: 'If the Russians, by reason of such fishing as they indulge in beyond the distance of 1 league from the coast, should wish to come ashore, the places where they land must not be . . .'. It is, therefore, clear that the views of the Royal Legislative Commission prevailed. (See Rejoinder, Annexes, pp. 31–32.)

"This position is confirmed by the statement in the Report of the Territorial Waters Boundary Commission dated February 29th, 1912, which may be referred to as the 1912 Report, page 18: 'Whatever may have been the object of the Rescript, a legal practice was nevertheless soon to develop whereby the dues were paid for the sojourn on land, and fishing beyond the distance of 1 league (1 mil) was regarded as fishing on the open seas'.

"There can, therefore, be no doubt about date. By 1830 there was definite recognition that fishing beyond the 4-mile limit was to be regarded as fishing on the open seas. The ancient exclusive rights of the offshore fishing grounds beyond that limit had disappeared in so far as Finnmark was concerned. Whether or not this situation obtained in other parts of Norway is not clearly established in the Record. There is no reason to believe that there was any difference in other parts of the country; but, in any event, by the year 1862 it was certain that the 4-mile limit had been established for the whole of the coast and for all purposes including fishing. (See Counter-Memorial, Annex No. 14.)

"Accordingly, it is now necessary to consider how and when the Norwegian System came into being as a part of the public law of Norway.

"The origin of certain elements of the Norwegian System—the four-mile limit, and the claims regarding the fjords and sunds and the 'skjærgaard'—are to be found in the 18th century or earlier: but the use of long straight base-lines departing from the coast is a modern invention.

"The foundation of the base-line doctrine has been attributed to the Royal Decree of 1691, which prohibited captures 'within sight of Our coasts, which is computed as 4 or 5 leagues from the outlying rocks'. I am unable to accept this view, because I think that this Decree meant what it said. 'Four or five leagues from the outlying rocks' meant a distance measured from the rocks, and not from imaginary base-lines many miles seaward from the outlying rocks. 'Within sight of the coast' meant range of vision. Range of vision, from its very nature, must be measured from something visible, a rock or the coast line. It is inconceivable that the Decree meant measurement from imaginary base-lines, invisible at short range, and, *a fortiori*, invisible at a distance of four or five leagues. There is nothing in the language used in subsequent laws or decrees, between 1691 and 1868, that indicates any change from the old, traditional practice of measurement from the coast line and outermost rocks, reefs and islands.

"This view is confirmed by the fact that there is not even one instance, arising before the commencement of the dispute and cited in the Record of this case, in which Norwegian claims to waters measured from straight base-lines (apart, of course, from bays) were enforced against a poaching or trespassing foreign ship, under the Decrees of 1691, 1745, 1747, 1756 or 1812, or under the Law of 1830.

"The first suggestion of a base-line doctrine is to be found in the Statement of Reasons by the Ministry of the Interior which led to the Sunnmöre Decree of 1869, and in the Norwegian Note No. 4 in the diplomatic correspondence with France, February 8th, 1870. The Norwegian System has had many restatements, and in the course of restatement there have been refinements and definitions and possibly even additions, but the heart of the System is to be found in these two documents.

"Accordingly, while the matter is not free from doubt, I shall proceed on the assumption that the Norwegian System came into being in 1869.

"It is not enough to prove that the Norwegian System came into being in order to establish it as a special doctrine of international law. It must be proved that it was made known to the world in such manner that other nations, including the United Kingdom, knew about it or must be assumed to have had knowledge.

"The first attempt by Norway to rely upon this doctrine was in the Sunnmöre Decree of 1869. There is no text of this Decree (or of the similar Decree of 1889) in the Record of this case. In the circumstances, it is necessary to rely upon a quotation contained in paragraph 59 of the Counter-Memorial which does not purport to set forth the whole text of the Decree, but which probably does so, and which reads as follows:

> '59. The Royal Decree of October 16th, 1869, provides that "a straight line at a distance of one geographical league, parallel with a straight line joining the islet of Storholmen and the island of Svinöy, should be considered as the limit of the sea belt off the

Case No. 36 *Contd.*

bailiwick of Sondmöre, within which the fishing shall be exclusively reserved to the indigenous inhabitants ".'

" The text of the Decree is unequivocal. It establishes a line of demarcation for a sector of the Norwegian coast far from the Disputed Areas (the same is true for the 1889 Decree). It says nothing about the coasts of Finnmark, Troms or Nordland. It does not pretend to lay down any principles of general application. In itself, it has no bearing on the present case. On the other hand, it does lay down a long base-line connecting two remote islands.

" The question to be decided is whether the making of one Decree, limited in its scope and applicable only to the particular coast of Sunnmöre in 1869, followed by a similar Decree continuing the line and using long straight base-lines for the particular coast of Romsdal in 1889, was enough to make known to the world the existence of the Norwegian System.

" The British concession that the waters covered by the Sunnmöre and Romsdal Decrees are Norwegian historic waters would justify a finding that these Decrees were sufficiently well known, but they did not make any claims extending beyond these two localities.

" On the other hand, neither the Norwegian Note to France, nor the Statement of Reasons was brought to the attention of other governments and certainly not to the attention of the British Government.

" Counsel for Norway reviewed the reasons for assuming British knowledge of the Norwegian System. He showed that the Decrees of 1869 and 1889 had been published in a gazette called the ' Bulletin of the Ministries ' and in books like Fulton and the Reports of the Institute of International Law. He made a good case for the view that the Decrees were well known to the world, but he did not point to any instance in which either the Statement of Reasons or the Note to France, No. 4, was communicated to the British Government, or, indeed, to any other foreign government.

" In these circumstances, I am unable to conclude that the British Government, or, indeed, any other foreign government except France, had any reason to believe that a Norwegian System had come into being in 1869–1889, or that these Decrees were anything more than local *ad hoc* measures.

" I do not intend to review all the official acts and public statements of the Norwegian Government or to examine the texts of the Laws and Decrees delimiting Norwegian waters, whether for fishing, prize or other purposes. For my part it is enough to say that they cover a long period of time, and that they indicate :

" 1st—that there was no Norwegian System under which exclusive rights were asserted over the fisheries in the Disputed Areas ;

" 2nd—that the public acts of the Norwegian Government were, during this period, consistent with claims to a belt of territorial waters, four miles in breadth, measured from the coast ;

" 3rd—that there was nothing in these public acts and documents which would lead the British, or any other foreign government, to believe that Norway was claiming the Disputed Areas ; or a right, as regards the whole country, to measure territorial waters from long base-lines departing from the line and direction of the coast.

" These circumstances greatly increase the difficulty which confronts me, when I am asked to find that there has been constructive notice to the British Government of the existence of the Norwegian System, or of such claims by the Norwegian Government. At most, the British Government could be assumed to have had knowledge that there was a possibility that Norway might, at some future time, try out a course in other parts of the coast, similar to that which had been followed in the Sunnmöre and Romsdal Decrees.

" It is impossible to overlook the fact that the evidence clearly indicates that the Government of the United Kingdom had no actual knowledge of the Norwegian System, or of the nature and extent of the rights claimed by Norway. Reference has already been made to an attempt by Sir Charles Wingfield to obtain information, and to the refusal by Mr. Esmarch to give any real indication of the nature and extent of the Norwegian claims. There are other instances of enquiries, and the Norwegian Agent gave an exhaustive list of the answers given (Statements in Court, pp. 175–176). An examination of these answers shows that no information was given to the Government of the United Kingdom, at any time before the commencement of the dispute, that could be regarded as actual or constructive notice that Norway was asserting the right to establish a belt of territorial waters measured from long base-lines departing from the line of the coast.

" There is one of the ' answers ', to which the Norwegian Agent referred, which requires special consideration, namely, the 1912 Report. This was a report of a Norwegian commission intended for the information and guidance of the Norwegian executive and legislative authorities. It contained extensive quotations from the Statements of Reasons for the 1869 and 1889 Decrees ; it showed that the commissioners favoured the method of measuring territorial waters from long straight base-lines ; and it put forward concrete proposals, similar to those adopted in the 1935 Decree, in the Annex No. 1 (supplemented by a later report by another committee in 1913—Counter-Memorial, Annexes 36 and 37). The Norwegian Government withheld these documents so that it was impossible for the British Government to understand the extent of the claims. Enough remained, however, in the body of the 1912 Report to show that Norway might be claiming the right to measure its belt of territorial waters from long straight base-lines.

" Accordingly, the question arises : whether this communication of the 1912 Report was notice to the British Government of the existence of the Norwegian System ; and, if so, whether there was acquiescence by that Government, so as to enable the claims constituting that System to ripen into rules of customary international law.

" Here, without going into the question whether the Report was an adequate warning of the existence of the System, I shall consider whether the failure of the British Government to make specific protests on receipt of the 1912 Report and of the Norwegian Note of November 29th, 1913, can be regarded as acceptance of the Norwegian claims.

" The circumstances attending this communication are plain enough. Controversy regarding the extent of Norwegian waters had arisen as a result of the seizure of the British trawler *Lord Roberts* in the Varangerfjord in March 1911 (Counter-Memorial, Annex 38). The difference between the two Governments, as understood at the time, was stated in the British Minister's Note of August 22nd, 1913, as follows :

> ' The points of view of the two Governments may be briefly defined as being that, while His Majesty's Government contend that, in the absence of any specific agreement to the contrary, jurisdiction cannot be exercised in waters beyond a distance of three marine miles from low-water mark, Norway claims as within her territorial jurisdiction all waters up to a distance of four marine miles, together with the whole area comprised in certain fjords.'

The Minister proposed a *modus vivendi*, and, in his proposal, made it clear that '. . . His Majesty's Government must insist on leaving the question of principle intact, and cannot admit that, failing a special understanding, the Norwegian Government are entitled to settle the disputed point arbitrarily in their own favour '.

Case No. 36 *Contd.*

"In the Norwegian Foreign Ministry's Note of November 29th, 1913, dealing with the proposal, reference was made to the 1912 Report:

> 'The reasons advanced by Norway in support of her delimitation of her territorial waters are set forth in the report of a Commission appointed in 1911. A few copies of a French translation of this report were forwarded to you unofficially at the time by my predecessor Mr. Irgens. In it those principles of international law were set forth, which, in the opinion of the Norwegian Government, were favourable to its point of view, together with the particular circumstances obtaining in the matter of Norwegian territorial waters, including the recognition accorded thereto, either explicitly or implicitly by foreign Powers.'

The Ministry went on to suggest modifications of the proposal. Nothing came of these negotiations, presumably because of the intervention of war.

"The 1912 Report was transmitted and adopted by the Norwegian Foreign Ministry as a statement of the principles of international law supporting the Norwegian position. This was done, however, in the course of negotiations for the establishment of a *modus vivendi*. By its very nature, a *modus vivendi* implies the reservation and preservation of the legal positions of both Parties to the controversy. If nothing had been said, it would have been necessary to imply an intention of both Parties to admit nothing and to maintain their legal positions intact. In this case, however, the negotiations proceeded on the basis of an express stipulation to leave 'the question of principle intact'.

"In these circumstances, I think that the British Government was justified in regarding all aspects of the negotiations, including the 1912 Report and the Note of November 29th, 1913, as covered by the basic reservation. The omission to make a specific reservation or objection at this stage cannot possibly be treated as proof of acquiescence in or acceptance of the Norwegian System.

"There is the further point, that from the time of the seizure of the *Lord Roberts*, in 1911, until the present the Parties have been in controversy about the extent of Norwegian waters and about the rights of British ships in areas which were regarded by the British Government as part of the High Seas. Parts of the controversy have been settled by the British concessions with regard to the four-mile limit, the fjords and sunds, and the recognition of the outer fringe of the 'skjærgaard' as the coast line. Apart from these concessions, the British Government has never admitted the right to measure territorial waters from long base-lines departing from the line of the coast or the 'skjærgaard', and it has maintained throughout the contention that the waters must be measured from the low-water mark. The transmission of the 1912 Report was made after the commencement of the dispute.

"The position of the Parties regarding knowledge of the Norwegian claims or notice of the existence of the Norwegian System may be summed up. Shortly after the commencement of the dispute, in the correspondence exchanged in 1913 and referred to above, the British Government received some indication that Norway might be making extensive claims as regards the demarcation of territorial waters, but no definite information as to the extent of the claim; and, as I have already indicated, the information was received in such circumstances that the failure to make immediate protest could not have been regarded as acquiescence even if the extent of the claim had been indicated. In 1923–1924 at the time of the *Kanuck* incident, both the British Government and the Norwegian Foreign Ministry were in the dark as to the nature and extent of the claims which are now regarded as being involved in the Norwegian System. The British Government was informed by the late Sir Francis Lindley that the Norwegian Government was relying on the application of the 10-mile rule for the Persfjord. The Norwegian Foreign Ministry thought that it was relying on the Harbakken-Kavringen closing line for the fjord, 9.4 marine miles in length. The communication by the Norwegian Foreign Ministry to the Secretary-General of the League of Nations, March 3rd, 1927, disclosed to the world the fact that Norway was asserting the right to mark out the belt of territorial waters from long straight base-lines, although even at that late date it was not yet clear that Norway was asserting the right to use base-lines that departed from the line and direction of the coast or of the outer fringe of the ' skjærgaard '. In the correspondence arising out of the *Lord Weir* seizure, there was a marked change on both sides. Sir Charles Wingfield's Note clearly indicated that the British Government had by that time learned that Norway was asserting the right to use long straight base-lines, and that it suspected that the Norwegian claim might be even more extensive than that which was involved in the closing line for the Syltefjord then relied on by the Norwegian authorities. The British Government was requesting definite information as to the nature and extent of the Norwegian claim. Mr. Esmarch's Note shows clearly that the Norwegian Foreign Ministry was then aware that much more extensive claims were in the offing, but that it was still impossible to give any real information as to the nature and extent of the claims. The British Memorandum to the Norwegian Government, July 27th, 1933, set forth in the Counter-Memorial, Annex 11, shows that even then the Government was still waiting for an authoritative statement as to the Norwegian claim. It is clear, therefore, that the British Government, notwithstanding repeated requests, was unable to obtain any definite information as to the true nature and character of the Norwegian System prior to the judgment in the *St. Just* case, and the publication of the Royal Norwegian Decree of 1935.

" In these circumstances, I cannot avoid reaching the conclusion that it has not been proved that the Norwegian System was made known to the world in time, and in such a manner that other nations, including the United Kingdom, knew about it or must be assumed to have had constructive knowledge.

" There is perhaps one qualification regarding the foregoing conclusion. It appears from the record of seizures and warnings to trawlers that Norway, in 1923, began to assert and enforce exclusive rights in the waters in dispute. There is an isolated instance of warning to a British trawler *Caulonia* in 1913, at a point outside the Green Line ; but no other instance of either seizure or warning at a point outside of that line before 1923. Between the years 1923–1949, there were twenty-four seizures and twenty-three warnings of trawlers at points within the Disputed Areas.

" There can therefore be no doubt that Norway, from 1923 on, was vigorously asserting and enforcing extensive exclusive rights. On the other hand, this was too late to support a claim to the existence of the Norwegian System as a doctrine of customary international law binding on the United Kingdom. The first of the seizures, the *Kanuck* in 1923, was the subject of diplomatic negotiation. While it would be entirely proper to attribute to the Government of the United Kingdom knowledge that Norway, during the period from 1923 to 1933, was asserting very wide claims as regards the extent of territorial waters, this all took place after the present dispute had come into being. It was too late to give effect to a special or regional doctrine of international law binding on the Government of the United Kingdom.

" I do not intend to comment on the different sectors of the coast, or to indicate, in detail, the parts of the Disputed Areas which are open

Case No. 36 *Contd.* to objection as not having been delimited in conformity with the principles of international law. In East Finnmark I consider that the Disputed Areas between base-points 5 and 12 are open to serious objection, and there I consider that the Green Line fairly indicates the extent to which the Blue Line is not in conformity with international law. Between base-points 12 and 35, while there are places where the Blue Line departs from the line and direction of the outer fringe of the 'skjærgaard', the Green Line is unsatisfactory for two reasons: (1) because it needs to be rectified in accordance with the British alternative submission; and (2) because further rectification would be necessary to take into account penetrations in the fringe of the 'skjærgaard' which in reality have the characteristics of bays enclosed by groups of islands.

"Between base-points 35 and 48, while the matter is not free from doubt, I am not inclined to question the Blue Line.

"Accordingly, in view of all of the foregoing considerations, I am led to the conclusion that the delimitation of the fisheries zone fixed by the Norwegian Royal Decree of July 12th, 1935, is not in conformity with the rules and principles of international law."

Territorial Waters—Subsoil of—Whether Part of Territory of the State.

See Case No. 38 (*Petroleum Development* (*Qatar*) *Ltd.* v. *Ruler of Qatar*).

V.—Continental Shelf

Case No. 37

Continental Shelf—Nature of—Whether Part of State Territory—Proclamations of Continental Shelf—Whether Declaratory of Existing Law—Exclusive Concession Created with Respect to Entire Territory—Whether Comprising Continental Shelf—Territorial Waters—Subsoil of—Whether Part of State Territory—Concessionary Agreements—Interpretation of—Application of Municipal Rules of Interpretation—General Principles of Law—Agreement between Independent Ruler and Private Company—Negotiations Preceding the Agreement.

PETROLEUM DEVELOPMENT LTD. *v.* SHEIKH OF ABU DHABI.

(Lord Asquith of Bishopstone, Umpire.)

September 1951.[1]

THE FACTS (as stated by the Umpire).—"On the 11th January, 1939, Sheikh Shakhbut of Abu Dhabi, one of the Trucial States abutting on the Gulf of Persia from the South and West, entered into a written contract in the Arabic language with Petroleum Development (Trucial Coast) Limited whereby the Sheikh purported to transfer to that Company the exclusive right to drill for and win mineral oil within a certain area in Abu Dhabi. That written agreement contained an Arbitration Clause, providing for the reference of disputes arising under it to Arbitration, for the appointment of two Arbitrators, and for the appointment of an Umpire in the event of the two Arbitrators being unable to agree. Certain disputes (the nature of which is indicated more precisely below, but which relate in substance entirely to the area of the Concession) have arisen under this agreement and were in fact referred to Arbitration ; the said Arbitrators did differ ; and appointed me as Umpire. According to the terms of the Arbitration Clause, this, my Award, in respect of the dispute is final.

---

[1] The Award does not state the date on which it was given. The Editor understands that it was delivered at the end of September 1951. The Proceedings were held in Paris, from Tuesday, August 21, to Tuesday, August 28, 1951.

" Abu Dhabi has a coast line of about 275 miles on the Gulf. It is bounded on the West by the State of Qatar, and on the East by the State of Dubai, both much smaller States. These frontiers, however, were and are to some extent vague. So is its mainland area, which has been estimated at anything from 10,000 to 26,000 square miles. The main reason for these wide divergencies is that the depth of Hinterland to be included is indeterminate. Abu Dhabi is a large, primitive, poor, thinly populated country, whose revenue, until oil was discovered, depended mainly on pearling. It is, like the other Trucial Principalities, a British-protected State ; that is, its external relations are controlled by His Majesty. Internally, the Sheikh is an absolute feudal monarch.

" The nature of the disputes referred to Arbitration and the subject matter of this Award are formulated in a letter from the Claimants to the Respondent dated the 18th July, 1949. The letter runs as follows :

> ' The arbitration is to determine what are the rights of the Company with respect to all underwater areas over which the Ruler has or may have sovereignty jurisdiction control or mineral oil rights.
>
> ' The Company claims that the area covered by the Agreement of the 11th January, 1939 (notably Articles 2 and 3 thereof), includes in addition to the mainland and islands :
>
> ' (1) All the sea-bed and subsoil under the Ruler's Territorial Waters (including the Territorial Waters of his islands), and
>
> ' (2) All the sea-bed and subsoil contiguous thereto over which either the Ruler's sovereignty jurisdiction or control extends or may hereafter extend, or which now or hereafter may form part of the area over which he has or may have mineral oil rights.'

" *The issues*: The questions referred to Arbitration can usefully be paraphrased by expanding them into four ; of

Case No. 37 *Contd.*

which the first two deal with territorial waters, and the second two with the submarine area outside territorial waters—

" (i) At the time of the Agreement of the 11th January 1939 did the Respondent—the Sheikh—own the right to win mineral oil from the subsoil of the sea-bed subjacent to the territorial waters of Abu Dhabi ? (There seems to be no doubt about this.)

" (ii) If yes, did he by that Agreement transfer such right to the Claimant Company ?

" (iii) At the time of the Agreement did he own (or as the result of a Proclamation of 1949 did he acquire) the right to win mineral oil from the subsoil of any, and, if so, what submarine area lying outside territorial waters ?

" (iv) If yes, was the effect of the Agreement to transfer such original or acquired rights to the Claimant Company ? (The Sheikh in 1949—ten years after this agreement—purported to transfer these last rights to an American Company—the ' Superior Corporation ' : which the Petroleum Development Company claim he could not do, since he had already ten years earlier parted with these same rights to themselves.)

" I would add that the parties requested me to express a view both on Question (iii) and on Question (iv), even if owing to the answer given to one of these questions, the other should become academic ; and the view expressed upon it at best an *obiter dictum.*

" *The terms of the Agreement* : The terms of the Agreement which are mainly relevant to the determination of these questions are Articles 2, 3, 12*a*, 1 and 17 ; from which I proceed to quote certain passages.

" The Agreement having originally been in the Arabic tongue, considerable differences have arisen as to what is and what is not an accurate translation. This applies particularly to what is the most crucial article of all, namely Article 2. Although, as will later appear, the divergencies between those translations are not important, I think I ought for completeness to set out the rival translations. In the translation originally relied upon by the Claimant Company, the wording of Article 2 is as follows :

' ARTICLE 2 (*a*) The area included in this Agreement is the whole territory subject to the rule of the Ruler of Abu Dhabi and its dependencies, and all its islands and territorial waters. And if in the future there should be carried out a delimitation of the territory belonging to Abu Dhabi, by arrangement with other governments, then the area (of this Agreement) shall coincide with the boundaries provided in such delimitation.

' (*b*) If in the future a Neutral Zone should be formed adjacent to the territories of Abu Dhabi and the rights of rule over such Neutral Zone be shared between the Ruler of Abu Dhabi and another Ruler, then the Ruler of Abu Dhabi undertakes that this Agreement shall include all the mineral oil rights which belong to him in such Zone.

' (*c*) The Company shall not undertake any works in areas used and set apart for places of worship or sacred buildings or burial grounds.'

" In the translation of this Article relied upon by the Respondent, the Sheikh, the wording is as follows :

' ARTICLE 2 (*a*) The area included in this Agreement is the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and its dependencies and all the islands and the sea waters which belong to that area. And if in the future the lands which belong to Abu Dhabi are defined by agreement with other States, then the limits of the area shall coincide with the limits specified in this definition.

' (*b*) If in the future a Neutral Area should be established adjacent to the lands of Abu Dhabi and the rights of rule over such Neutral area be shared between the Ruler of Abu Dhabi and another Ruler, then the Ruler of Abu Dhabi undertakes that this Agreement shall include what mineral oil rights he has in that area.

' (*c*) The Company shall not undertake any works in areas used and set apart for places of worship or sacred buildings or burial grounds.'

" *Article* 3 of the Agreement runs as follows in the translation relied upon by the Claimants :

' ARTICLE 3. The Ruler by this Agreement grants to the Company the sole right, for a period of seventy-five solar years from the date of signature, to search for discover drill for and produce mineral oils and their derivatives and allied substances within the area, and the sole right to the ownership of all substances produced, and free disposal thereof both inside and outside the territory : provided that the export of oil shall be from the territory of the Concession direct without passing across any adjacent territory.

' And it is understood that this Agreement is a grant of rights over Oil and cannot be considered an Occupation in any manner whatsoever.'

" In the translation relied upon by the Respondent the only difference is the wholly immaterial one that ' dig for ' appears in lieu of ' drill for '.

" *Article* 12*a* runs as follows :

" In the translation relied upon by both parties :

' ARTICLE 12 (*a*) The Ruler shall have right at any time to grant to a third party a Concession for any substances other than those specified in Article 3, on condition that this shall have no adverse effect on the operations and rights of the Company.'

" *Article* 1 defines the expression ' The Ruler ' in the translation relied upon by both parties as follows :

' ARTICLE 1. The expression " The Ruler " includes the present Ruler of Abu Dhabi and its dependencies and his heirs and successors to whom may in future be entrusted the rule of Abu Dhabi.'

" *Article* 17 is in these terms :

" In the translation relied upon by the Claimants :

'ARTICLE 17. The Ruler and the Company both declare that they intend to execute this Agreement in a spirit of good intentions and integrity, and to interpret it in a reasonable manner. The Company undertakes to acknowledge the authority of the Ruler and his full rights as Ruler of Abu Dhabi and to respect it in all ways, and to fly the Ruler's flag over the Company's buildings.'

" In the translation relied upon by the Respondents :

'ARTICLE 17. The Ruler and the Company both declare that they *base their work* in this Agreement on goodwill and sincerity of belief and on the interpretation of this Agreement in a fashion consistent with reason. The Company undertakes to acknowledge the authority of the Ruler and his full rights as Ruler of Abu Dhabi and to respect it in all ways, and to fly the Ruler's flag over the Company's buildings.'

" The variation between the two translations of Article 17 would seem immaterial.

" *Order in which questions considered* :

" *The order in which I propose to consider the questions* raised by the Arbitration is the following :

" (*a*) What is the true translation of the Agreement ?

" (*b*) What is the ' Proper Law ' of the Agreement, that is, the law applicable in interpreting it ?

" (*c*) If that law were applied to the bare language of the Agreement, and no regard were paid either (1) to the so-called doctrine of the ' Continental Shelf ' or, (2) to the negotiations leading up to its signature, what construction ought to be placed on those of its provisions which are the subject matter of the present dispute ?

" (*d*) What is the substance and history of the doctrine of the Continental Shelf ?

" (*e*) Is it an established rule of International Law ?

" (*f*) If it were, would it operate in any, and if so, what way to modify the construction of the contract which would prevail in its absence ?

" (*g*) If not, did the negotiations leading up to the execution of the contract have any such modifying operation ? "

Held : " that the Claimants succeed as to the subsoil of the territorial waters (including the territorial waters of islands) and that the Sheikh succeeds as to the subsoil of the Shelf ; by which I mean in this connexion the submarine area contiguous with Abu Dhabi outside the territorial zone ; *viz.* : the former is included in the Concession, and the latter is not ; and I award and declare to that effect."

The Umpire said :

" (*a*) *Translations.* I have indicated the two rival translations of the contract of 1939. There is in this matter little conflict ; and there would probably have been even less but for the circumstance that the Arabic of the Gulf, in which the contract is framed, is an archaic variety of the language, bearing, I was told, some such relation to modern current Arabic as Chaucer's English does to modern English. Such discrepancies, however, as exist between the two translations are fortunately trivial, and the Claimants were willing for purposes of argument to accept the translation put forward on behalf of the Respondent. I therefore adopt that translation in what follows.

" (*b*) *What is the ' Proper Law ' applicable in construing this contract ?* This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran ; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments. Nor can I see any basis on which the municipal Law of England could apply. On the contrary, Clause 17 of the Agreement, cited above, repels the notion that the municipal Law of any country, as such, could be appropriate. The terms of that Clause invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilised nations—a sort of ' modern law of nature '. I do not think that on this point there is any conflict between the parties.

" But, albeit English Municipal Law is inapplicable *as such*, some of its rules are in my view so firmly grounded in reason, as to form part of this broad body of jurisprudence—this ' modern law of nature '. For instance, while in this case evidence has been admitted as to the nature of the negotiations leading up to, and of the correspondence both preceding and following the conclusion of the Agreement, which evidence as material for construing the contract might, according to domestic English Law, be largely inadmissible, and to this extent the rigid English rules have been disregarded ; yet on the other hand the English rule which attributes paramount importance to the actual language of the written instrument in which the negotiations result seems to me no mere idiosyncrasy of our system, but a principle of ecumenical validity. Chaos may obviously result if that rule is widely departed from : and if, instead of asking what the words used mean, the inquiry extends at large to what each of the parties meant them to mean, and how and why each phrase came to be inserted.

Case No. 37 ***Contd.***

" The same considerations seem to me to apply to the principle *expressio unius est exclusio alterius*. I defer entirely to the warnings given by Wills J. and Lopes L.J. in the case of *Colquhoun* v. *Brooks* (19 Queen's Bench Division 400 at p. 406 : and 21 Q.B.D. 52 at p. 65) as to the possibilities (and indeed the frequency) of its misapplication. But confined within its proper borders it seems to me mere common sense. (If I have a house and a garden and two hundred acres of agricultural land and if I recite this and let to X ' my house and garden ', it seems obvious that the two hundred acres are excluded from the lease.)

" Much more dubious to my mind is the application to this case of certain other English maxims relied on by one or the other party in this case. For instance, *verba chartarum fortius accipiuntur contra proferentem* : or the rule that grants by a sovereign are to be construed against the grantee. The latter is an English rule which owes its origin to incidents of our own feudal polity and royal prerogative which are now ancient history; and its survival, to considerations which, though quite different, seem to have equally little relevance to conditions in a protected State of a primitive order on the Persian Gulf.

" (*c*) [*Territorial Waters as Part of the Territory of the State.*] The next point for consideration is what construction the words of the contract (in particular those of Articles 2 and 3, which are crucial) would bear, if (1) no regard were had to the doctrine of the so-called ' Continental Shelf ' or ' submarine area ', and (2) no regard were had to the negotiations preceding the Agreement or to the correspondence accompanying it. It may help in the first place to brush aside these complicating factors and consider the bare language of the Agreement itself ; reintroducing the complications at a later stage.

" Articles 2 and 3 define the area within which the Concession is to operate and therefore touch the heart of the dispute ; which turns entirely on the extent of that area.

" Article 2 opens with the words ' The area included in this Agreement '. ' Included ' for what purpose ? This question remits us to Article 3 which provides that the Ruler of Abu Dhabi grants to the Claimant Company the ' sole right ' for a period of seventy-five years to ' discover dig for and produce ' mineral oils and their derivatives and allied substances ' within the area '. The ' sole right ' shortly, is a right to win petroleum from the ' area ' in question. What area ? Turning back to Article 2 we find the area includes ' the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and their dependencies '. The sentence does not end there. It goes on with the words ' *and* all the islands and sea waters which belong to that area '.

" What does the word ' and ' mean in this connection ? In its most natural sense it surely means ' plus '. It introduces an addendum to something which has gone before. (I discuss an alternative meaning suggested for it below.) But if it simply means ‘ plus ’, then the expression ‘ the whole of the lands which belong to the rule of the Ruler ’ cannot be read literally ; for read literally that phrase would include in any case the islands, and probably the territorial waters, and it would not be necessary or sensible to make these items addenda. On this meaning of ‘ and ’, the ‘ land ’ must be limited to the mainland (no doubt not excluding inland or landlocked waters in an indented coast). What, on this basis, does the second addendum mean ? Viz. : ‘ the sea waters which belong to that area ’ ? Placing oneself in the year 1939 and banishing from one’s mind the subsequent emergence of the doctrine of the ‘ Shelf ’ and everything to do with the negotiations, I should have thought this expression could only have been intended to mean the territorial maritime belt in the Persian Gulf, which is a three mile belt ; together with its bed and sub-soil, since oil is not won from salt water. In what other sense at that time could sea waters be said to ‘ belong ’ to a littoral power or to the ‘ rule of the Ruler ’ ? In point of fact, that is the meaning the Claimant Company were asserting for the expression as late as March 1949, ten whole years after the contract (see letter page 86A of the Correspondence).

“ Even if ‘ and ’ had a different signification, not cumulative but epexegetic : such as ‘ and mark you, in case you are in doubt, I include in the “ lands ” the islands and sea waters which belong to the area ’, I should still hold, in the absence of what I have termed the two complicating factors, that the Concession covered the sea-bed and subsoil of the territorial belt. Nothing less. The only question would be whether it covered *more*.

“ *Conclusion as to territorial waters’ subsoil.* I therefore hold or find that the subsoil of the territorial belt is included in the Concession. Neither the ambiguity, if any, of the word ‘ and ’ nor any of the considerations dealt with hereafter affect this conclusion. In particular I cannot accept the argument put forward for the Respondent that sea waters are merely ‘ included ’ as a means of access to dry land, whether mainland or insular. To read the word ‘ included ’, in the Concession, as meaning in the case of the mainland and islands ‘ included as petroliferous areas ’ : and to read it in relation to the ‘ sea waters ’ as something totally different, namely, ‘ included as means of access to the petroliferous areas ’, seems to me unjustifiable, if not perverse.

“ I am not impressed by the argument that there was in 1939 no word for ‘ territorial waters ’ in the language of Abu Dhabi, or that the Sheikh was quite unfamiliar with that conception. Mr. Jourdain had none the less been talking ‘ prose ’ all his life because the fact was only brought to his

Case No. 37 *Contd.*

notice somewhat late. Every State is owner and sovereign in respect of its territorial waters, their bed and subsoil, whether the Ruler has read the works of Bynkershoek or not. The extent of the Ruler's Dominion cannot depend on his accomplishments as an international jurist.

" So far affirmatively. Negatively, (still leaving aside what I have called the complicating factors) I should certainly in 1939 have read the expression ' the sea waters which belong to that area ' not only as including, but as *limited* to, the territorial belt and its subsoil. At that time neither contracting party had ever heard of the doctrine of the Continental Shelf, which as a legal doctrine did not then exist. No thought of it entered their heads. None such entered that of the most sophisticated jurisconsult, let alone the ' understanding ' perhaps strong, but ' simple and unschooled ' of Trucial Sheikhs.

" Directed, as I apprehend I am, to apply a simple and broad jurisprudence to the construction of this contract, it seems to me that it would be a most artificial refinement to read back into the contract the implications of a doctrine not mooted till seven years later, and, if the view which I am about to express is sound, not even today admitted to the canon of International Law. However, the time has now come to consider the doctrine more narrowly.

" (*d*) *The doctrine of the Continental Shelf, its substance and history*. The expression ' Continental Shelf ' was first used by a geographer in 1898.[1] The legal doctrine which later gathered round this geographical term was possibly foreshadowed when in 1942 England and Venezuela concluded a treaty about the Gulf of Paria providing for spheres of influence in respect of areas covered by the high seas and followed by certain annexations coincident with these spheres. The doctrine was perhaps first explicitly asserted as a legal doctrine (in a very exaggerated form) in a proclamation by the Argentine Republic in 1944, but its classical enunciation in the form in which it has mainly to be considered in this case was the well-known proclamation by President Truman of 28th September, 1945.

" The substance of the doctrine then proclaimed, as I understand it, was this : A coastal power is not surrounded, even at low water, by a precipice leading vertically to the bottom of the ocean, perhaps two miles below. As a rule the sea-bed shelves very gently outwards and downwards for a considerable distance, a distance generally (but not invariably) exceeding the three mile territorial limit.[2] Again, not always but very often, where the sea reaches a depth of about a hundred fathoms or (what is much the same thing) two hundred metres, the edge of this shelf is reached and there is a more or less abrupt plunge of the land-mass down to the ocean floor. The doctrine of the 'Shelf' as proclaimed in the Truman Declaration of 1945 arrogated to the United States 'jurisdiction and control' over 'the resources' of the American Continental Shelf which was described as 'appertaining' to the United States.

---

[1] It made a fleeting appearance on the legal stage in 1916 : but passed over it with ' printless feet '.

[2] If I speak of the three mile limit and of the Territorial Maritime Belt interchangeably, this is only for brevity. I am aware that some States claim more than a three mile belt, but about 80 per cent. of the merchant shipping in the world is registered in " three mile " countries ; and this is the width of territorial waters on the Persian Gulf.

"The resources referred to were those of the subsoil of that zone of the sea-bed which lies between the limit of the territorial waters and the point at which its gently shelving character gives place to an abrupt descent.[1]

"Several other States followed roughly the same course as the United States. For instance, Great Britain (not quite on the same lines) in respect of Jamaica and of the Bahamas, and Saudi Arabia in respect of parts of the Persian Gulf. Other States weighed in with similar claims. These other States fall into two groups; *I*. Mexico and the Latin and Central American Republics, and *II*. The States which are most directly relevant in this Arbitration—States bordering on the Persian Gulf other than Saudi Arabia.

"In almost every case the claim was embodied in a decree or proclamation. Most often, though not invariably, the proclamation was in a 'declaratory' form, that is in a form asserting or implying that the proclamation was not constitutive of a new right but merely recorded the existence of a pre-existing one.[2]

"I. The claims of the Latin and Central American Republics were often far more ambitious than those of this country, the United States and Saudi Arabia; inasmuch as on the one hand the former claims were often claims to actual sovereignty over the Shelf and its subsoil [3] and on the other hand, and this is more important, the claims were often not limited to the Shelf as a geological entity or even to the area ending where the depth of the sea began to exceed a hundred fathoms, but sometimes extended to a zone two hundred nautical miles from the mainland; an area quite unrelated to the width of the physical

---

[1] It does not seem to make any difference for the present purpose whether as a matter of geological fact the "Shelf" was built up by erosion of material from the unsubmerged portion and by its sedimentation, or whether the Shelf was originally there in a denuded state and was subsequently submerged by what is poetically called the "transgression of the seas".

[2] Declaratory: see for instance the proclamations of Saudi Arabia, 28th May, 1949, of the Trucial States including Abu Dhabi of 10th June, 1949; the Truman Proclamation of 1945, though its language is not on this point wholly free from ambiguity: and contrast with these proclamations the language of the United Kingdom proclamations in the case of the Bahamas, 27th November, 1949; Jamaica, 26th November, 1948; and of the Falkland Islands, 21st December, 1950, all of which employ somewhat annexatory language such as "the boundaries" of the Colony "are hereby extended": language "constitutive" of rather than merely declaratory of the rights involved.

[3] As in the case of Argentina 1944, Mexico 1945, and Chile 1947.

Case No. 37 *Contd.*

Shelf.[1] In these exorbitant forms the claims met with protest and resistance; but in the more modest form in which they were advanced by the United States, the United Kingdom and Saudi Arabia, they were acquiesced in by the generality of Powers, or at least not actively gainsaid by them.

"II. *The British Persian Gulf Proclamations.* The proclamation of Saudi Arabia was followed in 1949 by proclamations issued by the Sheikhs of the Trucial States (or on their behalf by the Government of the United Kingdom *qua* protecting Power) including the Sheikh of Abu Dhabi. All of these last proclamations conform broadly in their terms to the Truman proclamation. They mostly contain recitals on the following lines: 'Whereas it is just that the sea-bed and subsoil extending to a reasonable distance from the coast should appertain to and be controlled by the littoral state to which it is adjacent'. The Abu Dhabi Proclamation of 10th June, 1949, provides in its operative part 'We, Shakhbut Bin Sultan Bin Za'id, Ruler of Abu Dhabi, hereby declare that the sea-bed and subsoil lying beneath the high seas in the Persian Gulf contiguous to the territorial waters of Abu Dhabi and extending seaward to boundaries to be determined more precisely as occasion arises on equitable principles by us after consultation with the neighbouring states appertain to the land of Abu Dhabi and are subject to its exclusive jurisdiction and control'.

"(*e*) *Is the doctrine in any of its forms part and parcel of international law?*

"The preceding section calls attention not only to the recent origin of the doctrine but to the great variety of forms which in its short life it has assumed. Some States claim sovereignty over the Shelf. Others pointedly avoid doing so, claiming only 'jurisdiction' or 'control', 'appurtenance' and the like. Whatever the scope of the rights claimed, some States assert those rights by declaratory proclamations implying their pre-existence; others issue proclamations which are on the face of them a new departure and designed to be constitutive of title. What is the seaward limit of the Shelf? Here again the answers given differ. Some States say, its geological or geographical limit, its 'edge' or its 'drop'. Others (whether because their particular Shelf has got no edge and has got no drop, or for other reasons) say: 'the point at which the sea becomes a hundred fathoms or two hundred metres deep'; while yet others say: 'a line drawn parallel to the coast of the contiguous power and two hundred nautical miles from it'. The two hundred mile claim seems to be more or less universally discredited. The other two criteria seem on their face much more reasonable. But what is the position where, as in the Persian Gulf itself, both of these more reasonable criteria fail us, because the Shelf not only has no edge, but extends continuously across a sea whose waters never attain a depth of as much as a hundred fathoms? Is it to extend outwards to a 'reasonable distance' from the coast—the expression used in the recital of the Abu Dhabi proclamation? If so, what is a 'reasonable distance'? Where States are grouped, as in this case, round a more or less cylindrical Gulf, is the principle '*usque ad medium filum*' applicable? How could it possibly be applied in the case of comparably shallow seas of completely irregular configuration, such as the North Sea? Again, how are rights of whatever character to the subsoil of the Shelf acquired? Can they indeed be acquired at all? Or would their existence inevitably conflict with the 'freedom' of the high seas? Before the doctrine of the Shelf was promulgated I think the general answer might well have been that they cannot be acquired at all—that the Shelf is as inappropriable as the high seas that roll or repose above it: subject to this reservation, that the sea-bed (not the subsoil) of the submarine area is, in certain rare cases, subject to a customary right vested in certain States to conduct 'sedentary' fisheries in such sea bed. For instance the right to fish for sponges, coral, oysters, pearls and chank.[1] Indeed the shallow seas of the Persian Gulf are subject to mutual pearling rights by subjects of the various littoral States. If, however, the submarine area is capable not merely of being the subject matter of these limited occupational rights over the sea-bed, and pro tanto a '*res nullius*', is its subsoil as a whole *res nullius*? That is to say something in which rights can be acquired, but only by effective occupation? Or is the position, as the Claimants' main argument maintains, that the rights in the subsoil of the Shelf adhere (and must be taken always to have adhered) *ipso jure*—occupation or no occupation—to the contiguous coastal Power? Or failing that, if occupation be indeed necessary; in cases where it is almost impracticable, may proclamations or similar acts be treated as a constructive or symbolic or inchoate occupation (the Claimants' alternative contention under this head)?

---

[1] As in the case of Chile, El Salvador, Honduras and Costa Rica.

"*Conclusion as to doctrine of the Continental Shelf.*

"Neither the practice of nations nor the pronouncements of learned jurists give any certain or consistent answer to many —perhaps most—of these questions. I am of opinion that there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed hitherto the hard lineaments or the definitive status of an established rule of International Law.

---

[1] An incompletely sedentary crustacean. I gathered from Professor Waldock that a chank moves very slowly: *eppur si muove*: on this whole subject Sir Cecil Hurst's Paper read to the Grotius Society in 1948 is the *locus classicus*.

Case No. 37 *Contd.*

" Whether there *ought* to exist a rule giving effect to the doctrine in one or other and, if so, which of its forms is another question and one which, if I had to answer it, I should answer in the affirmative. There seems to me much cogency in the arguments of those who advocate the *ipso jure* variant of the doctrine. In particular : (1) it is extremely desirable that someone, in what threatens to become an oil-starved world, should have the right to exploit the subsoil of the submarine area outside the territorial limit ; (2) the contiguous coastal Power seems the most appropriate and convenient agency for this purpose. It is in the best position to exercise effective control, and the alternatives teem with disadvantages ; (3) there is no reason in principle why the subsoil of the high seas should, like the high seas themselves, be incapable of being the subject of exclusive rights in any one. The main reasons why this status is attributed to the high seas is (i) that they are the great highways between nations and navigation of these highways should be unobstructed. (ii) That fishing in the high seas should be unrestricted (a policy approved by this country ever since Magna Carta abolished ' several ' fisheries). The subsoil, however, of the submarine area is not a highway between nations and the installations necessary to exploit it (even though sunk from the surface into the subsoil rather than tunnelled laterally) need hardly constitute an appreciable obstacle to free navigation ; nor does the subsoil contain fish. (4) To treat this subsoil as *res nullius*—' fair game ' for the first occupier—entails obvious and grave dangers so far as occupation is possible at all. It invites a perilous scramble. The doctrine that occupation is vital in the case of a *res nullius* has in any case worn thin since the East Greenland Arbitration and more especially since that relating to Clipperton Island. But leaving that aside, it is difficult to imagine any arrangement more calculated to produce international friction than one which entitles nation A, it may be thousands of miles from nation B, to stake out claims in the Continental Shelf contiguous to nation B by ' squatting ' on B's doorstep—at some point just outside nation B's territorial water limit.

" The question just considered, namely not what is but what ought to be the rule, is not so irrelevant as it might at first sight appear, for the following reason : the International Law Commission appointed by the United Nations with M. François as Rapporteur, has been investigating the doctrine and problems of the Continental Shelf. This body has made a number of reports of great interest and importance including a draft code contained in the Report of the Third Session of the International Law Commission (A–CN 4–48) consisting of some six or seven short articles of which I will quote the first three.

' Article 1 : As here used the term " Continental Shelf " refers to the sea-bed and subsoil of the submarine areas contiguous to the coast but outside the areas of territorial waters where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil '.

' ARTICLE 2 : The Continental Shelf is subject to the exercise by the coastal state of control and jurisdiction for the purpose of exploring it and exploiting its natural resources '.

' ARTICLE 3 : The exercise by a coastal state of control and jurisdiction over the Continental Shelf does not affect the legal status of the superjacent waters as high seas '.

" These draft Articles have been prayed in aid by the Claimants with the implication that they are, or are intended to be the expression of principles which are already part of international law, not merely of principles which ought to, or might with advantage form part of, that law in future. If this is indeed the contention of the Claimants, I am of opinion that it is ill-founded. It is clear that the Codifying Commission of the International Law Commission is charged with two distinct functions, (1) that of recording existing rules of international law, and (2) that of indicating what the law should be ; promoting as the phrase runs, ' the progressive development of international law ' by preparing draft conventions on ' subjects which have not yet been regulated by international law, or in regard to which the law has not yet been sufficiently developed in the practice of States '. It seems to me clear that these Articles were framed in the discharge not of the first but of the second of these functions. As the Commission in paragraph 6 of its commentary on Article 2 says : ' The Commission has not attempted to base on customary law the right of a State to exercise control and jurisdiction for the limited purposes stated in Article 2, and though numerous proclamations have been issued over the past decade it can hardly be said that such unilateral action has already established a new customary law '.[1]

---

[1] In respect of this interpretation of the suggested Articles—viz. : as recommendations rather than records—the following United Nations documents are relevant ; besides A–CN 4–48 of 1951 itself (the suggested Articles and commentary thereon), A–CN 4–Sr. 66, 67, 68 and 69 (these last constituting the Summary Record of the meetings of the Second Session of the International Law Commission 1950). Perhaps I may make this footnote the vehicle for an expression of gratitude to those who addressed me, for bringing to my notice some of the voluminous literature—articles, addresses and other publications—by experts on the Continental Shelf. Those from which I have derived the most instruction include :

(1) Prof. H. Lauterpacht's article entitled " Sovereignty over Submarine Areas " which is likely to be published in the *British Year Book of International Law*, Vol. 27, 1950, pp. 376–433 almost simultaneously with this Award.

(2) Professor Waldock's article " The Legal Basis of Claims to the Continental Shelf " (to appear in *Transactions of the Grotius Society*, Vol. 36, 1950) previously printed as a paper submitted to the Copenhagen Conference of the International Law Association 1950.

(3) Mr. Richard Young's article " The Legal Status of Submarine Areas beneath the High Seas " published in the *American Journal of International Law*, Vol. 45, 1951, April, pp. 225–249.

(4) The Memorandum of the Secretary General of the United Nations on

Case No. 37 *Contd.*

" I therefore cannot accept these Articles as recording, or even purporting to record, established rules: and if they do not, if they are mere recommendations as to what such rules might with advantage be, if adopted by International Convention, they clearly cannot affect the construction of the contract of 1939.

"(*f*) Pausing here before dealing with the last question, viz.: the effect, if any, of the *negotiations* on the meaning of the contract; and considering only the possible effect on the construction of the contract of the doctrine of the Shelf; I would summarise as follows the Claimants' argument and my conclusions about it: The Claimant's primary contention is (1) that the doctrine of the Shelf is settled Law, (2) that it always was so, and therefore that it was so in 1939; ergo, the meaning which some of the expressions in the contract would or might otherwise have borne is enlarged by the inclusion therein of the Shelf. For instance, in Article 2 either the expression ' the whole of the lands which belong to the rule of the Ruler of Abu Dhabi ' or the expression ' and the sea waters which belong to that area ', are so enlarged by the inclusion of an area in this case measuring over 10,000 square miles of *extra*-territorial marine subsoil. The argument falls to the ground if I am right in rejecting the premiss on which it rests, namely, that the doctrine of the Shelf has become and, indeed, was already in 1939, part of the *corpus* of international law.

" Again, if I am right in rejecting that premiss, the second way in which they put their case also fails; here they rely on the proviso to Article 2 which says that ' If in future the lands which belong to Abu Dhabi are defined by agreement with other States, then the limits of the area ' (of the Concession) ' shall coincide with the limits specified in this definition '. The argument is that the Concession is by these words expressly to extend to any after-acquired area of Abu Dhabi, and that the effect of the proclamations of 1949, if not retrospective, cannot be less than to add the Shelf to the area originally covered as from the date when the proclamations were promulgated. This argument also fails if I am right in thinking that the premiss on which it rests is invalid; but I think it would fail independently of that since there has been no definition of anything ' by agreement with other States ', and I should have thought in any case that the definition referred to was limited to one affecting dry land, whether epirot or insular.

" Lastly:

" (*g*) *The Negotiations.* Did the negotiations attending the conclusion of the contract operate to modify what I have held

---

the Regime of the High Seas—2nd Session (1950) of the International Law Commission (A/CN 4/32).

(5) The works of Sir Arnold MacNair *passim*; my debt to which is too diffused to be particularised by chapter and verse.

to be the construction which the contract would bear if there had been no such negotiations ? I do not find it possible to base any firm conclusion under this head on the use of Arabic words such as ‘ ard ’ or ‘ aradi ’ or ‘ mantiqua ’ in the negotiations leading up to the agreement, nor on the fact that the price offered for options for oil concessions to the various Trucial Sheikhs from 1935 onwards till 1939 were proportioned not to any square mileage which included marine areas, but only to the length of the respective coast lines ; although it is clear that marine areas were at this stage quite outside the contemplation of the parties.

“ Some evidence was given as to oral interchanges between the Sheikh on the one hand and Mr. Lermitte and Brigadier Longrigg on the other in the last fortnight or so before the contract was signed. The Sheikh in his evidence said, I doubt not in perfect good faith, that the meaning of the expression ‘ the sea waters belonging to that area ’ was never discussed with him at all. The two witnesses for the Company say that it was : they said that they explained that the territorial water belt of three miles would be included *prima facie* in the Concession, but added that the Sheikh then claimed that he ruled the waters leading out from the coast to islands, fifty, or one of them even a hundred, miles out from the shore : and that it was in deference to this claim of the Sheikh’s that the formula ‘ and the sea waters belonging to that area ’ was inserted.

“ I am clearly of opinion and find as a fact that the Sheikh’s recollection was at fault in so far as he said that the phrase in question was never mentioned in the negotiations. Mr. Lermitte and Brigadier Longrigg cannot have imagined the discussion to which they testified. They were excellent witnesses in point both of integrity and accuracy ; although under the latter head one cannot forget that they, like the Sheikh, were testifying to events twelve years old. I think it more probable than not that the Sheikh did claim to rule coastal seas outside the three mile limit. It is not the custom of oriental potentates to minimise the extent of their dominions ; but having regard particularly to subsequent correspondence it seems to me far more probable that this was, and was taken by the Claimants to be, a rhetorical flourish than that it was either intended or treated at the time as a sober contractual stipulation. In a similar vein we say ‘ Britannia rules the waves ’. We do not except to be taken literally. If we were, we should be challenging the doctrine of the freedom of the seas.

“ Certainly there is nothing in the correspondence for a whole ten years or more after the Contract to suggest that the Company attached any binding contractual quality to this statement, assuming it was made. As late as the 9th March, 1949 (page 84a of the Correspondence) the Company were claiming no more (apart from the mainland and islands) than the territorial three mile belt. On 24th March, 1949, however, a controversial discussion (recorded at page 87 and the following pages of the Correspondence) occurs between Mr. Lermitte and the Sheikh on which some such claim is raised for the first time. The Sheikh is contending that the Company have no right under the Agreement to drill in any part of the sea-bed even in the territorial zone. Mr. Lermitte replies, ' It is recognised universally that the boundaries of any country situated on the sea extend automatically three miles into the sea. This is what is called " territorial waters ".' In the latter part of this interview as recorded, Mr. Lermitte for the first time claims more submerged land than that covered by territorial waters, and this does not appear to be expressly challenged by the Sheikh (page 88, sub-page 3) : but Brigadier Longrigg even as late as 25th March, 1949 in a letter from London is only mooting in a very tentative fashion the view that where ' exclusive rights are granted to a Company in respect of the whole of a State including its territorial waters then the Company is entitled to the same rights in respect of the subsoil of the Continental Shelf appertaining to that State ' (page 89). If Brigadier Longrigg had had a clear express promise of a contractual order from the Sheikh of rights in respect of the subsoil in the sea for fifty or a hundred miles out from the coast, no halting tentative and *ex post facto* recourse to the Shelf doctrine would have been needed. He would have had an express undertaking valid without reference to that doctrine, and would have said so.

" For these reasons I am of opinion that the *prima facie* construction of the Agreement, which in my view excludes from the Concession the Shelf, is not modified so as to include it by the negotiations incident to the Agreement any more than by the (in my view incompletely established) doctrine of the Shelf itself."

[Report : *International and Comparative Law Quarterly*, vol. 1, 4th Series (1952), p. 247.]

Note.—The Umpire concluded the Award with the following observation :

" I would only add in conclusion a word about the Qatar Arbitration over which Lord Radcliffe presided. I have reached a result in this case which happens closely to correspond with that reached by Lord Radcliffe in that case, on other facts and a different agreement. There is in fact little connection between the two Arbitrations if only because in the Qatar Agreement there was no allusion in the contract to ' sea waters ' at all. If Lord Radcliffe instead of merely recording his conclusions had expounded the principles on which he had reached them, I should have derived invaluable and authoritative guidance from such an exposition ; but as he took the course he did, I am to that extent *inops consilii*, and have only departed from his (perhaps more prudent) method and gone into general principles at the express invitation of the parties. . . ."

The award in the *Qatar Arbitration* is printed below (Case No. 38).

Continental Shelf—Whether Part of State Territory—Exclusive Concession Granted with regard to the Entire Territory of the State—Whether Including Continental Shelf—Whether Covering Subsoil of Territorial Waters—Concessionary Contract between Independent Ruler and Private Company. **Case No. 38**

PETROLEUM DEVELOPMENT (QATAR) LTD. *v.* RULER OF QATAR.

(Lord Radcliffe, Third Arbitrator.[1])
April 1950.[2]

THE FACTS (as stated, in part, by the Arbitrators).—" On 17th May, 1935, H.E. Shaikh Abdullah bin Qasim al Thani, Ruler of Qatar, entered into a written agreement with the Anglo-Persian Oil Company, Limited, whereby he granted to that Company certain rights in the terms set out in the various Articles of that Agreement. The First Article of the Agreement expressed that the Shaikh granted to the Company, in virtue of the Agreement and under conditions that were specified later, ' the sole right throughout the Principality of Qatar to explore, to prospect, to drill for and to extract and to ship and to export, and the right to refine and sell petroleum and natural gases, ozokerite, asphalt and everything which is extracted therefrom '. The Second Article of the Agreement provided that, subject to the conditions of Article 7 of the Agreement, the Company could ' operate in any part of the State of Qatar as is defined below, but it will not operate on places such as religious lands, cemeteries, lands occupied by religious buildings, or by essential enterprise by their owners as may exist on the date of the signature of this Agreement or any customary extensions of such religious lands or cemeteries or buildings as may be pointed out by the Shaikh. The State of Qatar means the whole area over which the Shaikh rules and which is marked on the north of the line drawn on the map attached to this Agreement.' It was further specified that the period of the Agreement should be 75 years from the date of its signature. The Agreement contained in all twenty-two Articles.

" By Article 16 of the Agreement it was provided that if any dispute should occur between the Shaikh and the Company in regard to the interpretation of the Agreement or any matter arising therefrom or in regard to the engagements obligatory on

---

[1] The " Arbitrator-Advocates " for the Ruler were Mr. N. R. Fox-Andrews, K.C., and for the Company Sir Walter Monckton, K.C.

[2] The award bears no exact date. The Editor understands that it was rendered in April 1950. The arbitration took place in Dohah in the State of Qatar between February 9 and 15, 1950.

Case No. 38 *Contd.* either of the parties in accordance therewith, the dispute should be referred to two Arbitrators, if no agreement could be arrived at for settling it by any other method, and that one of such Arbitrators should be appointed by the Shaikh and the other by the Company. It was further provided that those two Arbitrators should thereupon appoint a third Arbitrator, but that if they were unable to agree upon the third Arbitrator within sixty days from the demand for arbitration, the third Arbitrator should be appointed by His Majesty's Political Resident, subject to the Shaikh approving of such third Arbitrator. Finally it was provided that the Award of Arbitration should be consistent with the legal principles familiar to civilised nations: that the decision of the majority of Arbitrators should be final: and that the place of Arbitration should be Qatar.

" In the year 1946 the Anglo-Persian Oil Company, Limited (which had, by then, changed its name to that of the Anglo-Iranian Oil Company, Limited) assigned its rights and obligations under the Agreement to Petroleum Development (Qatar) Limited.

" In the month of June, 1949, a dispute occurred between H.E. Shaikh Abdullah bin Qasim al Thani and the Company concerning the extent of the area that was subject to the rights granted by the Agreement set out in Paragraph 1 above (hereinafter referred to as ' the Concession '). The precise questions that are involved in the dispute are set out below. No agreement was arrived at for settling the dispute by any other method, and it was accordingly referred to arbitration in accordance with the provisions of Article 16 of the Concession.

. . . . . .

" During the course of the hearing it was agreed that the precise questions in dispute as to the extent of the area that is subject to the rights granted to the Company by the Concession should be stated as follows, subject to two points which were conceded by the Shaikh's Arbitrator and which are mentioned below:

> " (*a*) Whether the Concession includes islands over which the Shaikh rules and which are shown on the map attached to the Concession.
>
> " (*b*) Whether the Concession includes islands over which the Shaikh rules and which are not shown on the map.
>
> " (*c*) Whether the Concession includes the bed and subsoil of all the inland or national waters of the mainland of Qatar and its islands.
>
> " (*d*) Whether the Concession includes the sea-bed and subsoil beneath the territorial waters of the mainland of Qatar and its islands.
>
> " (*e*) Whether the Concession includes the sea-bed and

subsoil beneath the high seas of the Persian Gulf contiguous with such territorial waters, which sea-bed and subsoil are more particularly mentioned in the Proclamation issued on 8th June, 1949, by H.E. Shaikh Abdullah bin Qasim al Thani.

" During the course of the hearing the Shaikh's Arbitrator placed it on record that he did not dispute :

' (i) that the Concession includes islands over which the Shaikh rules and which are shown on the map attached to the Concession if and so far as any such island lies to the north of the line drawn on the map, or

' (ii) that the Concession includes any lakes and rivers of Qatar, whether shown on the map or not, if and so far as any such lake or river lies to the north of the aforesaid line.'

" Subject to what is recorded . . . above, the Company's Arbitrator and the Shaikh's Arbitrator maintained conflicting views upon the several questions set out in Paragraph 9 above, the Company's Arbitrator maintaining that each of the five questions ought to be answered in the affirmative, while the Shaikh's Arbitrator maintained that each of them ought to be answered in the negative. It thus became the duty of the Third Arbitrator to decide in each case what was to be the Award of the majority of the Arbitrators.

Held, as to : " (*a*) and (*b*) The Third Arbitrator and the Company's Arbitrator decide that the Concession includes islands over which H.E. Shaikh Abdullah ruled at the date of the Concession, whether or not they are shown on the map attached to the Concession, and they so award.

" (*c*) The Third Arbitrator and the Company's Arbitrator decide that the Concession includes the bed and subsoil of all the inland or national waters (i) of the mainland of the State of Qatar in so far as it lies to the north of the line drawn on the aforesaid map, and (ii) of the islands mentioned in (*a*) and (*b*) above, and they so award.

" (*d*) The Third Arbitrator and the Company's Arbitrator decide that the Concession includes the sea-bed and subsoil beneath the territorial waters (i) of the mainland of the State of Qatar in so far as it lies to the north of the aforesaid line, and (ii) of the islands mentioned in (*a*) and (*b*) above, and they so award.

" (*e*) The Third Arbitrator and the Shaikh's Arbitrator decide that the Concession does not include the sea-bed or subsoil or any part thereof beneath the high seas of the Persian Gulf contiguous with such territorial waters, which sea-bed and subsoil are more particularly mentioned in the aforesaid Proclamation of 8th June, 1949, and they so award.

[Unreported.]

Case No. 38 *Contd.*

NOTE.—(1) Although the Award was given in 1950, it has been deemed convenient to reproduce it in the present volume having regard to the award in the *Abu Dhabi Arbitration* (see Case No. 37 above).

(2) As stated in Lord Asquith's Award (see above, p. 160), the present Award is limited to a bare decision without any indication of the reasoning on which it is based. However, it is being reproduced here as being *in pari materia* with the *Abu Dhabi Arbitration* on a matter on which arbitral authority is scarce.

VII.—Bays

Bays—Delimitation of—Base-Line—Ten-Miles Rule.

See Case No. 36 (*Anglo-Norwegian Fisheries Case*).

XII.—Demilitarized Zones

Case No. 39

State Territory—Parts of—Demilitarized Zones—Whether Part of State Territory—Offences against Security of the State—Israel-Syria General Armistice Agreement of 1949—Whether Demilitarized Zone within Frontiers of the State of Israel.

ATTORNEY-GENERAL OF ISRAEL *v.* EL-TURANI.

Israel, District Court of Haifa. August 21, 1951.

Supreme Court sitting as the Court of Criminal Appeals. December 31, 1952.

THE FACTS.—El-Turani was accused of offences against the Official Secrets Ordinance, alleged to have taken place in a village situated within a demilitarized zone which had been created under Article 5 of the General Armistice Agreement between Israel and Syria of July 20, 1949 (*U.N.T.S.*, vol. 42, p. 327). This demilitarized zone was situated entirely on the western, *i.e.* Israel, side of what had formerly been the international frontier between Palestine and Syria. Under the General Armistice Agreement, any Syrian forces which had advanced beyond that international frontier, retired behind it, but Israel military forces were not entitled to re-occupy the area thus evacuated, which thus became demilitarized. The area in question had been included in the territory of the proposed Jewish State in accordance with the terms of Resolution 181 (II) on the future Government of Palestine, adopted by the General Assembly of the United Nations on November 29, 1947. It was argued for the defendant that the demilitarized zone could not be regarded as part of the territory of Israel and, therefore, that the Israel courts could not exercise criminal jurisdiction with respect to offences committed therein.

Held (by the District Court): that the accused must be convicted. The demilitarized zone was within the territory of Israel and criminal jurisdiction was exercisable therein.

Per Landau J.: " With regard to offences which were committed in Syria, the rule is that the Court will exercise jurisdiction only over offences committed within the frontiers of the State (see s. 6 of the Criminal Code Ordinance, 1936). But there are exceptions. International law recognizes the right of a State to punish its own citizens and foreign citizens for certain offences, including offences against its own security, committed outside its borders (see Oppenheim, *International Law*, 7th ed. (1948), vol. 1, pp. 299–300). The Ottoman legislator also made use of this power in s. 5 of the Code of Criminal Procedure (Young, *Corps de droit ottoman*, vol. VII, p. 227), which is still in force. The same idea appears in s. 3 (b) of our Criminal Code Ordinance of 1936, according to which the provisions of the Code shall be without prejudice to the liability of any person to be tried and punished for certain actions done beyond the ordinary jurisdiction of the courts (*Lahis* v. *Minister of Defence and Others* [*Annual Digest*, 1949, Case No. 34]).

" The question arises, what are the offences against the security of the State referred to. Mr. Geiger argued that the intention only relates to treason. I do not think the notion is so limited. The origin of these provisions is found in French Law. Article 7 of the *Code d'Instruction criminelle* is very similar to the provisions of the Ottoman Law. Among other things it speaks of ' Crime attentoire à la sûreté de l'État ', that is to say, of the offences mentioned in Articles 75–108, inclusive, of the French Code which is headed: ' Crime et délit contre la sûreté de l'État '. These include not only treason, but also other offences against the security of the State, including espionage in favour of another State. . . ."

After referring to the English Law on the subject, including the Official Secrets Act, 1911, the Judge continued:

" It is true that, so far as concerns treason, jurisdiction is restricted to those who are under the duty of allegiance to the British sovereign, and so far as concerns official secrets, to British officials and British subjects, while the Ottoman Law applies to any foreigner arrested in the Ottoman Empire. On that basis Mr. Geiger argued that the accused had not been arrested in the State of Israel. But he was arrested within the demilitarized zone and, as will be explained, this zone is within the territory of Israel. But I think that even were the accused not under lawful arrest within the State, the very fact that he was under arrest within the State at the time of the trial is sufficient to give this Court jurisdiction. . . .

" In its judgment in the *Lahis* case (*supra*), the Supreme Court also touched upon the question whether Article 38 of the Palestine Order-in-Council prevented legislation extending the territorial jurisdiction of the courts beyond the borders of Palestine, but did not find it necessary to answer this question, on the ground that the enactment there in question had been enacted after the establishment of the State. In my opinion Article 38 of the Order-in-Council is irrelevant here. . . . Its purport is not to define the jurisdiction of the courts according to the place in which the offence was committed, but, *inter alia*, according to the place in which the accused is at the time of the trial. So far as concerns criminal trials, that Article states that any person in the State, and only those persons, may be tried criminally. My conclusion therefore is, that this Court is competent to try offences against the Official Secrets Ordinance which were committed in Syria. . . . Since the jurisdiction of this Court does not depend on the offences having been committed within the State, it follows that it also has jurisdiction over offences committed in the demilitarized zone, even if this zone is not part of Israel. But the truth is that this problem does not arise at all because the demilitarized zone is part of the State of Israel.

" Mr. Geiger argued, in so far as concerns the demilitarized zone, that the State of Israel does not possess this area, since the only way of determining the boundaries of the State is by the fact of physical possession, and for this reason the demilitarized zone is not part of the State. I do not find it necessary in this judgment to define the situation in the demilitarized zone, either today or on the day on which the offence was committed. There may be a contrast between the situation in fact and the situation that ought to be in law. For this Court, the nature of the demilitarized zone is purely a question of law. In this connexion the position is clear, both according to Israel municipal law and according to international law. As to Israel law, I will simply refer to the Declaration of Independence [see *Authorized Translation of the Laws of Israel*, vol. I, p. 3]. Although the Supreme Court has held that this document does not have the force of law [cf. *Annual Digest*, 1948, Case No. 4], it nevertheless illustrates the intention of the founders of the State. They based themselves on two elements : the natural and historic right of the Jewish people, and the Resolution of the General Assembly of the United Nations of November 29, 1947. It is correct to state that the boundaries of Israel have not been explicitly defined in any legislative act of the State of Israel. But several laws mention ' the area of the State of Israel ' as a matter not requiring definition. . . . I will not take it upon myself to propose a general definition of the State of Israel since the legislator has apparently not found it necessary to do so yet."

The Judge here referred to the Area of Jurisdiction and Powers Ordinance, 1948,[1] and explained that, in enacting it, the legislator certainly had in mind the Resolution of the General Assembly, to which was added the occupied areas, thereby creating a new territorial unit, namely, the territory in which the law of the State of Israel applies. He went on :

---

[1] See *Annual Digest*, 1949, p. 70 (Note to Case No. 26).

" The State of Israel includes, therefore, at least the territories allocated to it under the United Nations decision. Those areas include the demilitarized zone. . . .

" I assume that this Court has to pay attention also to the relevant stipulations of international law. In *Kharbutli* v. *Minister of Defence and Others* [*Annual Digest*, 1949, Case No. 19] the Supreme Court stated that the Mandate, as part of international law, was binding upon the Power to which the Mandate was entrusted. From this remark I deduce that the Courts of Israel must act in accordance with obligations which the State may take upon itself under international law. From the point of view of international law, the demilitarized zone is included within the Partition Resolution, which is a document having validity under international law. The State of Israel has never renounced its sovereignty over the demilitarized zone. The General Armistice Agreement between Israel and Syria imported no change. Paragraph 2 of Article 2 stresses that the provisions of that Agreement were ' dictated exclusively by military and by political considerations '. Article 5, paragraph 1, repeats and emphasizes that the arrangements for the demilitarized zone are not to be interpreted ' as having any relation whatsoever to ultimate territorial arrangements affecting the two Parties to this Agreement '. From this it follows that the international frontiers of the two States remained as they were. Paragraph 2 of that Article says that the Armistice Demarcation line and the demilitarized zone have been defined with a view towards separating the armed forces of the two Parties in such manner as to minimize the possibility of friction and incident, providing for the gradual restoration of normal civilian life in the area of the demilitarized zone, without prejudice to the ultimate settlement. Here again, the general character of this Agreement as a military agreement is emphasized. It did not bring about any other changes in the existing state of affairs. On the contrary, from the stipulation about the restoration of normal civilian life it follows beyond all doubt that the intention of the Parties to the Agreement was to restore to the State of Israel full freedom of action in the demilitarized zone, except as limited by the military stipulations expressed in the Agreement. I may also mention paragraph 5 (*e*) of Article 5 of the Agreement, because this apparently does restrict the sovereignty of the State in the matter of recruiting civilian police in the demilitarized zone, and on this basis it might be possible to argue as follows : If the State is not free to recruit civilian police in the demilitarized zone, then obviously the competence of the Court is limited

Case No. 39 *Contd.*

because a Court cannot exercise criminal jurisdiction unless it has policemen at its disposal. But what does this paragraph say? 'The Chairman of the Mixed Armistice Commission shall be empowered to authorize . . . the employment of limited numbers of locally recruited civilian police in the zone for internal security purposes, and shall be guided in this regard by the schedule of withdrawal . . . [*i.e.* the withdrawal of the armed forces].' The question arises: Employment of civilian police by whom? Certainly not as an independent police force, nor can it be assumed that the police force could be employed by the Chairman of the Mixed Armistice Commission. For this reason the conclusion is inevitable that the policemen must be employed by the State exercising sovereignty over the demilitarized zone and that the restrictions upon their recruitment were based upon military considerations so that the maintenance of a police force in the demilitarized zone would not detract from its demilitarization.

"The accused himself persistently denied, in his statements to the police and before this Court, the competence of this Court on the ground that the demilitarized zone is a kind of no-man's-land, a *res nullius*, in which the United Nations observers are the only authority. Mr. Geiger did not fully endorse this argument. At all events, it is not convincing. The duty of the observers and of the Mixed Armistice Commission, as defined in Article 7 of the Agreement, is to supervise the execution of the provisions of the Agreement, which is, in its nature, a military agreement. The State of Israel has not renounced its sovereignty over the zone and assuredly this sovereignty has not been vested by the General Armistice Agreement in the Mixed Armistice Commission or in the United Nations observers, or in any other body.

"Therefore, I am of the opinion that, both by the law of Israel and by international law, the demilitarized zone is part of the State of Israel, and this Court has full competence to try all offences committed in it."

On appeal,

Held (by the Supreme Court, *per* Vitkon J.): that the decision of the Court below convicting the accused must be upheld. The Court said:

"As to the question of the demilitarized zone, our opinion is that the learned Judge of first instance was correct in concluding that the competence of the Court extends over the said zone. Counsel for the appellant did not try to explain what in fact is the position of the demilitarized zone according to international law, but contented himself with the argument that under the Armistice Agreement the Government of Israel does not have full authority over the zone. According to him, in the demilitarized zone the State has neither policemen nor judges, and what is law, he asks, which is not supported by sanction ? But even if we assume that the rights of the State over the demilitarized zone are restricted, not only militarily but also in respect to civil authority, it does not necessarily follow that the State does not have sovereignty over the demilitarized zone. Sovereignty is divisible, as Oppenheim explains and demonstrates by many examples, wherein powers connected with sovereignty are shared by more than one State (*International Law*, 7th ed. (1948), vol. 1, pp. 116 and 409). As Verdross has pointed out (*Jus Gentium*, vol. 1 (1949)), care must be taken not to confuse sovereignty in the sense of territorial supremacy with authority. Sovereignty can exist *de jure*, authority exists *de facto* ; and if sovereignty derives from authority *de facto*, sovereignty is certainly possible even without authority *de facto*. Precisely the cases of limitations on its authority which a State assumes by virtue of international agreements furnish evidence of sovereignty, since, but for its sovereignty, why should it have to limit its authority through an agreement ? Oppenheim (*op. cit.*, p. 259, n. 5) mentions that the Permanent Court of International Justice has several times taken occasion to point out that, so far from treaty obligations being restrictions upon sovereignty, ' the right of entering into international agreements is an attribute of State sovereignty '.

" Territorial competence in criminal matters depends upon sovereignty but not upon authority. Therefore, there is no need to examine what is the situation of the demilitarized zone from the point of view of authority and we come to no conclusion on that question. For the purposes of the case before us, it is enough for us to determine that the sovereignty over the demilitarized zone is vested in Israel. The learned Judge below reached this conclusion after a thorough and comprehensive analysis of the Declaration of Independence and several other Laws enacted after the establishment of the State of Israel. We can find nothing incorrect in his reasoning and have nothing to add thereto. But since the question related to the foreign relations of the State, we found it necessary to approach the Ministry for Foreign Affairs, notifying both parties, asking it to inform us if the village which is in the demilitarized zone is inside the frontiers of Israel or not, and the reply of the Ministry was in the affirmative. From this it follows more clearly that the offences of which the appellant was accused were committed within the area sovereignty over which is vested in the State of Israel. The reply of the Ministry for Foreign Affairs also provides conclusive answer to the argument submitted by the appellant's Counsel to the effect that, in so far as concerns the demilitarized zone, Israel's frontiers have not yet been determined and that there is still doubt whether the zone is within the territory or not. As sovereignty is vested in the State so,

Case No. 39 *Contd.*

too, do its courts of law have territorial competence over a man charged with criminal offence committed therein. For this reason we reject the argument of Counsel for the appellant in the matter of competence."

[Reports: *Pesakim Mehoziim,* 5 (1951–1952), p. 123; *Piskei-Din,* 6 (1952), p. 1145; *Pesakim Elyonim,* 8 (1952), p. 261.]

PART IV

JURISDICTION

A—IN GENERAL. TERRITORIAL AND PERSONAL

I.—Territorial

i.—Over Territory in General and Persons and Property Situated therein. Territorial Limits of Jurisdiction. Expropriation of Alien Property

[See also Part II, STATES AS INTERNATIONAL PERSONS: A, IV, *Recognition of Acts of Foreign States and Governments*, and D, *Recognition of States and Governments*.]

Jurisdiction — Territorial Limits of — Foreign Legislation Transferring Movable Property of Foreign Nationals in England—Whether Enforceable in English Courts—Confiscatory Legislation—Public Policy—*Lex situs*—Position of Allied Government-in-Exile—Trading with the Enemy Act, 1939—What is Enemy Property—Meaning of Belonging to or "Held or Managed on behalf of" Enemy—Peace Treaty between United Kingdom and Hungary, 1947—Interpretation of Order based on Treaty—Charges on Hungarian Property—Whether Company's Property deemed to "belong" to Shareholders. **Case No. 40**

BANK VOOR HANDEL EN SCHEEPVAART N.V. *v.* SLATFORD AND ANOTHER.

England, High Court of Justice, Queen's Bench Division.
(Devlin J.)
July 30, 1951.

THE FACTS.—The plaintiff Bank was a Netherlands limited company. All the shares were owned by a Hungarian national domiciled in Switzerland, Baron Heinrich Thyssen-Bornemisze, until his death in 1947; when 6½ per cent. of his estate went to his youngest son Heinri, also a Hungarian national, and 12½ per cent. each to each of his other children, who were not Hungarian nationals.

Before the Second World War the plaintiff Bank deposited with the City Safe Deposit in London a quantity of gold bars, worth some two million pounds sterling. The gold was there at the outbreak of war on September 3, 1939, when the Trading with the Enemy Act, 1939, came into force. The Custodian

Case No. 40 *Contd.*

appointed under the Act was aware of this deposit of gold, which he supposed erroneously to belong to a German family. He had some communication with the City Safe Deposit about it in September 1939, but he took no action then. In addition to its property in the gold, there was due to the plaintiff Bank on May 20 from various banks in London sundry balances amounting in all to £17,682 17s. 8d.

In May 1940 the Netherlands were invaded, and on May 20 became enemy territory. The Bank retained its commercial domicile in Holland, and thus at once acquired, and during the war never lost, enemy character. After the invasion the Royal Netherlands Government exercised their sovereign powers from London, and on May 24, 1940, they issued a decree (Decree A 1) regarding property belonging to persons resident in occupied Holland. Its object was to prevent such property from being used in ways incompatible with the interests of the Netherlands, and to that end required such property to be entrusted to the State for so long as might be necessary.

On July 3, 1940, the Board of Trade, under the Trading with the Enemy Act, 1939, s. 7, made a vesting order transferring the gold to the Custodian, who sold the gold for the sum of £1,984,120 15s. 5d. and retained the proceeds as enemy property. The bank balances due to the plaintiff Bank from various banks in London were not transferred to him until long after the conclusion of hostilities.

On October 2, 1944, the United Kingdom and the Netherlands entered into an agreement (hereinafter called " the Property Agreement ") which provided that certain property held under British Trading with the Enemy legislation should be transferred to the Netherlands Government, namely, property which " falls within the definition of enemy property contained in the United Kingdom Trading with the Enemy legislation and belongs to persons or bodies of persons who are and have been ' enemies ' within the meaning of the Trading with the Enemy Act solely because they are and have been resident or carrying on business in Netherlands territory in Europe on and since May 15, 1940 ". Under this Agreement a committee was set up to determine what was Netherlands property and what was not. This Committee did not begin to function until some time after the end of hostilities.

On December 7, 1941, the United Kingdom and Hungary became at war with each other ; Hungary had been enemy territory for the purpose of the Trading with the Enemy Act, 1939, since April 8, 1941.

The Treaty of Peace between Hungary and the United Kingdom was concluded on February 10, 1947, and came into operation on September 15. It provided by Article 29 (1) that the United Kingdom should have the right to seize, retain and liquidate all property, rights and interests which were then within its territory and belonged to Hungarian nationals, and to apply such property or proceeds to such purposes as the United Kingdom might desire within the limits of its claim against Hungarian nationals, any excess to be returned. By Article 29 (3) the Hungarian Government was to compensate Hungarian nationals whose property was taken under this Article and not returned to them. By Article 29 (5)(*c*), however, the property of Hungarians resident in United Nations territory was not in general to be seized.

On January 26, 1948, the Treaty of Peace (Hungary) Order, 1948, was made, to take effect from February 2, 1948. By this Order, Article 29 of the Treaty was given effect as law. The Order set up the office of Administrator of Hungarian Property, and provided that all property to which the Order applied was to be charged with the amounts due at the date when the Treaty came into force in respect of claims against the Government of Hungary or Hungarian nationals.

Meanwhile, on November 6, 1947, the Committee set up under the Anglo-Dutch Property Agreement held its first meeting. As the result of its deliberations a black-list was drawn up by the Trading with the Enemy Department of assets which were not to be released without previous investigation. The property in question in this case was included in this list among the cases in which there was prima facie evidence of substantial enemy interests, it being still erroneously supposed that some German interest was concerned.

From the end of hostilities until July 1948, the Bank was under Dutch Government control. On July 22, 1948, shortly after the control was removed, the Bank's solicitors wrote to the Administration of Enemy Property Department requesting that the assets should be released. After a very long delay the request was refused. On April 6, 1950, the Administrators, pursuant to Article 1 (5)(*e*) of the Treaty of Peace (Hungary) Order, 1948, required the Custodian to transfer the proceeds of the sales and of the bank balance to him, supporting that demand by a certificate, issued under Article 1 (5)(*g*) of the Order, that the property was Hungarian property subject to the charge imposed by the Order. Accordingly, the Custodian paid to the Administrator £1,962,852 14s., having deducted a fee of approximately £40,000, which he (the Custodian) was authorized to deduct under Article 7 of the Trading with the Enemy (Custodian) Order, 1939.

On May 19, 1950, the Netherlands Government made an order for restitution to the plaintiff Bank of the property taken under the A. 1 Decree. On the same date the Bank demanded from the Custodian and the Administrator that the property should be transferred to it, and on that demand being refused, issued the writ in the present action.

The plaintiff Bank claimed against the Custodian of Enemy

Property (the first defendant), in conversion, the present value of the gold bars, and against the Administrator of Hungarian Property (the second defendant) the amount paid to him by the Custodian, on the ground that it was not within the charge imposed by the Treaty of Peace (Hungary) Order, 1948.

Held: (*a*) that the A. 1 Decree of the Netherlands Government was ineffective to transfer movable property in England to the Netherlands Government; that the Orders of July 1940 under the Trading with the Enemy Act were accordingly valid; and that the Custodian was not therefore liable to the plaintiff Bank.

(*b*) that there was nothing in the scope of the Treaty of Peace with Hungary or in the Treaty of Peace (Hungary) Order, 1948, which could be regarded as affecting the rule of law that the property of a company was neither the property of the shareholders, nor held or managed by the company on behalf of its shareholders, and accordingly the Bank was entitled to recover the capital sum representing the proceeds of the sale of the gold from the administrator.

Devlin J., after setting out the facts, dealt first with the claim against the Custodian, which depended upon whether the A. 1 Decree of the Netherlands Government had been effective to transfer the property to the Netherlands Government. " The plaintiffs say that the orders made in July, 1940, under the Trading with the Enemy Act were invalid because at that date the property was not enemy property, but, by virtue of the A. 1 decree, the property of the Netherlands Government. The substantial question raised is, therefore, whether the A. 1 decree was effective to transfer property situate in this country.

" I shall take first the argument on the A. 1 decree. The custodian submits that the English courts will not enforce it since they will treat it as having no extra-territorial effect. The plaintiffs' submission is that the general rule is to the contrary, and that the legislation of a foreign State affecting the title of its nationals to movables in England will be applied by the English courts unless, first, the legislation is contrary to public policy—as, for example, confiscatory or penal legislation—or, secondly, its application would infringe English legislation. Alternatively, the plaintiffs submit that, if it be the general rule that foreign legislation is not enforceable, then the decree falls within an exceptional category.

" I think it is convenient to begin by considering what is the general principle of our law with regard to foreign legislation affecting property within our territory. There is little doubt that it is the *lex situs* which as a general rule governs the transfer of movables when effected contractually. The maxim *mobilia sequuntur personam* is the exception rather than the rule, and is probably to be confined to certain special classes of general assignments such as marriage settlements and devolutions on death and bankruptcy. Upon this basis the A. 1 decree, not being a part of English law, would not transfer the property in this case. But decrees of this character have received in the authorities rather different treatment. Although there is not, as far as I am aware, any authority which distinguishes general legislation, such as part of a civil code, from *ad hoc* decrees, the effectiveness of such decrees does not appear on the authorities to be determined exclusively by the application of the *lex situs*. Apart from two recent cases on which the plaintiffs greatly rely, there has been no case in which such a decree has been enforced in this country, but the grounds for refusing effect to them have been variously put. Sometimes it is said that the decree is confiscatory. In the textbooks it is said sometimes that as a matter of public international law no State ought to seek to exercise sovereignty over property outside its own territory, and therefore the principle of comity is against enforcement; and sometimes it is said that the principle of effectiveness is against enforcement, since no State can expect to make its laws effective in the territory of another State. Dicey, *Conflict of Laws*, 6th ed., p. 13, states: ' A State's authority, in the eyes of other States and the courts that represent them, is, speaking very generally, coincident with, and limited by, its power. It is territorial. It may legislate for, and give judgments affecting, things and persons within its territory. It has no authority to legislate for, or adjudicate upon, things or persons not within its territory.'

" The Solicitor-General has argued on principle that no foreign legislation, whether confiscatory or not, can be allowed to affect property in this country. It is beyond dispute that confiscatory legislation will not be allowed to do so, and the Solicitor-General contends that the distinction between confiscatory and non-confiscatory is not a satisfactory one. In *Tallinna Laevauhisus* v. *Tallinna Shipping Co. Ld.* ((1867) 2 Ch.D. 55, 60) legislation which provided for compensation amounting to 25 per cent. of the value was held to be confiscatory. Presumably any decree which did not provide for full compensation would be held to be confiscatory. Now that decrees involving State acquisition and requisition are comparatively common, it may not be easy to ascertain whether full compensation is provided for or not. The Compensation (Defence) Act, 1939, places certain limits on the amount of compensation: for example, no account is to be taken of any appreciation in value due to the war. While that is doubtless a healthy rule for British nationals, it might well result in a neutral getting less than the full value of his goods. If a decree, such as the A.1 decree, contemplates that the property taken is to be preserved for the benefit of its owners and to be returned to them at the conclusion of the war, but contains no legal obligation to that effect, is the hope and expectation that the subject will get his property returned to him sufficient to save it from being confiscatory ?

" There are other considerations of principle which can be advanced in support of the defendants' argument. First, in the construction of our own statutory legislation we accept the principle that, unless the contrary is made clear, an Act of Parliament is not intended to have extra-territorial effect. Secondly, the principle as submitted by the defendants is in harmony with the principle which favours the *lex situs* generally. Thirdly, if extra-territorial effect is given to foreign property legislation, it can only be at the expense of English law affecting the same subject-matter.

" This seems to me a point worth detailed consideration. The plaintiffs do not suggest that such legislation could override the express provisions of an Act of Parliament. But while it is easy to concede that some limits would have to be imposed, it is not so easy to define what they should be. No foreign legislation could have any effect at all unless the common law, by which ordinarily rights of property are governed, was subordinated to it. I know of no authority for distinguishing in this respect between the common law and statute. Some codifying statutes are merely declaratory of the common law. Moreover, a statute can be affected although its provisions are not expressly overridden. In *Rex* v. *Paddington and St. Marylebone Rent Tribunal, Ex parte Bedrock Investments Ld.* ([1948] 2 K.B. 413) and *Rex v. Fulham and Kensington Rent Tribunal, Ex parte Marks* ([1951] 2 K.B. 694), if I may pick out a recent example of this, the Furnished Houses (Rent Control) Act, 1946, was said to ' affect ' the Rent Acts because they interfered with the scheme of control which the latter Acts set up.

" For an example of the sort of interference of this type which foreign legislation might cause, it is unnecessary to go further than the present case. On May 20, 1940, the plaintiffs' gold became subject to the control imposed by the Trading with the Enemy Act. A vesting order might be made whenever the Board of Trade thought fit ; and meanwhile article 4 of the Trading with the Enemy (Custodian) Order, 1939, provided : ' No person shall, without the consent of the Board of Trade, save as directed by this order transfer, part with or otherwise deal with the property of any enemy '. The A. 1 decree unwittingly snatched the gold from under the custodian's hand.

" The conflict might not always be so direct as that. At the beginning of the war all goods were made subject to requisition by the British Government. Should the courts allow that object to be defeated by the legislation of allied or neutral governments endeavouring to further their own war efforts or safeguard the property of their subjects? Could neutral legislation be allowed, for example, to nullify the prerogative right of angary? The plaintiffs submit that these problems can be solved by the application of some principle of public policy. I shall have to consider later that suggested solution; for the moment I say no more than that any rider of the 'unruly horse' must feel himself very firmly in the saddle before he undertakes to drag any number of foreign decrees through the thickets of our domestic legislation.

"There is one more consideration under this head. Our own statutes may sometimes conflict, but they are at least designed to fit in with each other. Foreign legislation cannot be so designed, and it will generally be founded on a basis of property law very different from our own. Our statute law has evolved rules of construction for settling differences as between instruments of equal efficiency, as, for example, *generalia specialibus non derogant*; but these would not help to decide how much room was to be given to subordinate legislation. In short, a principle of private international law that allows property legislation to operate in the territory of another country, so far from being a principle which resolves the conflict of laws, will create a conflict which it will require the formulation of a new system to settle. There seems to me to be every reason, if the authorities permit it, for giving effect to the simple rule that generally property in England is subject to English law and to none other.

"There are three comparatively recent authorities in point. In *Lorentzen* v. *Lydden & Co. Ld.* ([1942] 2 K.B. 202) Atkinson J. decided that a decree of the Royal Norwegian Government acquiring, in return for compensation, property of its subjects in England was effective to transfer such property to the Norwegian Government. In *O/Y Wasa Steamship Co. Ld.* v. *Newspaper Pulp and Wood Export Ld.* ((1949) 82 Ll.L.Rep. 936) Morris J. followed this decision and applied it to the decree A.1 which I have to consider in this case. In both these cases the property concerned was a claim for damages for breach of a charter-party. The latter case involved a great number of points, and I am told by counsel concerned in the case that the principle in *Lorentzen* v. *Lydden & Co. Ld.* was not much debated. The main authority on which the plaintiffs rely is therefore *Lorentzen* v. *Lydden & Co. Ld.* I think that that case is directly in point; I am unable to distinguish it upon the ground suggested—namely, that the point that the decree was in conflict with the Trading with the Enemy legislation was not expressly taken in argument. The defendants rely mainly on *Government of the Republic of Spain* v. *National Bank of Scotland Ld.* (*The El Condado*) (1939 S.C. 413; (1939) 63 Ll.L.Rep. 330, *sub nom. The El Condado*), a decision of the Inner House of

Case No. 40 *Contd.*

the Court of Session and therefore of high persuasive authority. The court was considering a claim by the Spanish consul to the possession of a Spanish ship which he had sought to requisition while she was at Glasgow in accordance with powers granted by a Spanish decree. It does not appear from those parts of the decree set out in the report whether it provided for compensation or not, but it is clear that it was not treated by the court as confiscatory. The Scottish court refused to enforce the decree. The plaintiffs are unable to distinguish this case from *Lorentzen* v. *Lydden & Co. Ld.* or from the present case except by saying that different considerations of public policy are involved.

" In *Lorentzen* v. *Lydden & Co. Ld.* Atkinson J. surveyed the earlier authorities in order to arrive at his conclusion that there was no general rule preventing him from enforcing the Norwegian decree. I do not find it entirely clear whether he held that all foreign property legislation was enforceable unless contrary to public policy, or that the general rule excluded all such legislation, subject to certain exceptional categories, within one of which the Norwegian decree fell. I shall examine the cases to see if any general rule can be extracted from them.

" It is of course true, as Atkinson J. points out, that these authorities did not necessarily involve a decision on the principle which I am here considering. Most of them could have been decided the way they were either on that ground or on the ground that the decrees were confiscatory. If any of these authorities were binding on me, it would be necessary to ascertain what was the *ratio decidendi* in each case. But since none of them are, I do not think it is profitable to examine the judgments minutely in order to determine, if I can, which part of the reasoning was decisive. What I propose to do is to ascertain whether there are any *dicta, obiter* or otherwise, which clearly show that the author was relying as part of his reasoning upon the principle of the *lex situs*, irrespective of the construction of the decree or of its confiscatory character. I think that there are. The *dicta* in *Lecouturier* v. *Rey* ([1910] A.C. 262) are not conclusive, but they point in that direction. It is plain from Lord Macnaghten's speech that this statement of the principle was not dependent on the construction of the decree. But the decree was confiscatory and it may be that the statement of principle should be treated as restricted to that type of decree, although there is nothing in the language which either he or Lord Loreburn L.C. used to suggest that. Lord Macnaghten said : ' It must be beyond the power of any foreign court of any foreign legislature to prevent the monks from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired here or to extend or communicate the benefit of that reputation to any rival or competitor in the English market.' Lord Loreburn

L.C. said : ' This property (for property it is) which has come in question in this appeal is property situated in England, and must therefore be regulated and disposed of in accordance with the law of England.'

" In *Sedgwick Collins & Co.* v. *Rossia Insurance Co. of Petrograd* ([1926] 1 K.B. 1) Sargant L.J., referring to Russian nationalization decrees, said : ' Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country, such as debts owing from debtors here : see Dicey, *Conflict of Laws*, 2nd ed., p. 310, and *Lecouturier* v. *Rey*.' The reference to Dicey is not to the passage cited earlier in this judgment of mine, but in support of the contention that debts are locally situate in the country of the debtor.

" In *The Jupiter* (*No*. 3) ([1927] P. 122) Hill J. was dealing with confiscatory degrees which did not purport to have effect outside Russia, but this statement of general principle can hardly be explained on either of the two alternative grounds. He says : ' These circulars show that the R.S.F.S.R. recognizes and enforces the general principle that the passing of chattels is governed by the law of the place where they are locally situate, and in particular recognizes that the nationalizing decrees do not operate upon property outside the territory of the R.S.F.S.R.' In the Court of Appeal ([1927] P. 250) no general principle was laid down ; but Atkin and Lawrence L.JJ. both referred with approval to the whole of the judgment of Hill J.

" Maugham J. in *In re Russian Bank for Foreign Trade* ([1933] Ch. 745) was dealing with the same situation, that is, decrees which were confiscatory and which did not purport to have extra-territorial effect. He considers the point with which I am concerned and it is plain that he does not base his decision on the construction of the decrees. He lays down the principle in general terms that the decrees could not have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet Republic.

" While it is true that in all these cases there was confiscatory legislation, I think it would be surprising if, with so many masters of the law all intending to restrict the statement of the principle to confiscatory legislation, no one of them had used in his statement of the principle some words of limitation. This consideration disposes me to think that the view of these *dicta* taken by the Court of Session in *The El Condado* is the right one. The Lord Justice Clerk, having stated that the principle clearly applies to confiscatory or penal laws, inquires whether it equally applies to legislation which is not confiscatory or penal in the full sense. He treats *The Jupiter* (*No*. 3) as being an authority in point, and concludes that the decree cannot apply to movable property outwith the territory and jurisdiction of the foreign

Case No. 40 *Contd.*

sovereign State. Lord Mackay says that he finds in the cases 'a most emphatic train of eminent English judges in favour of the view that such "decrees" of a foreign country as purport to have extra-territorial effect, and to attach property in a subject situated, and at a time when it is situated, in this country or its territorial waters, will not be recognized by our laws and courts.' Lord Wark reviews all the English authorities and concludes by adopting the passage in Dicey which I have cited.

"My recollection of the argument in *Lorentzen* v. *Lydden & Co. Ld.* is that Atkinson J. was referred to *The El Condado*; but he does not distinguish it in his judgment. I recognize the force of the point that, if the principle were as wide as the custodian says it is, there would be no need for any case to have been decided on the basis that the legislation was confiscatory. But the *dicta* in the English cases seem to me to be sufficient to support the conclusion in *The El Condado*; and for the reasons that I have given I think that the rule there laid down is a sound one. If Atkinson J. is to be taken as deciding that the general rule was otherwise, I respectfully prefer the decision in *The El Condado*.

"The question next arises whether the A.1 decree belongs to a special category which should form an exception to this general rule. The real ground stated by Atkinson J. in *Lorentzen* v. *Lydden & Co. Ld.* for regarding the Norwegian decree as exceptional is that, England and Norway being engaged together in a desperate war for their existence, public policy required that effect should be given to the decree. This reasoning at once gives rise to three comments. The first is that it amounts to the formulation of a new head of public policy, and that is not a matter to be lightly undertaken. The second is that it is using public policy, not in accordance with precedent, as a restriction upon acts which are thought to be harmful to the community, but in a novel way as a positive force to give to an act validity which it would otherwise lack. The third is that it appears to cast on the court the duty of considering to some extent the political merits of the decree itself.

"The plaintiffs in their argument before me accept that it is not possible for the courts to judge of the expediency of any particular decree; and I think that they admit also that it would be beyond the wit of man to devise a principle which would admit the politically desirable decrees and exclude the undesirable. They therefore put their submission on this point in a form which seeks a middle way between these two extremities. They submit that the exceptional category consists of decrees of an allied Power in respect of the property of its nationals made in this country with the approval or at least with the acquiescence of His Majesty's Government with a view to keeping property out of the hands of a common enemy. They claim that the approval or acquiescence of the government is to be inferred from the fact that the decree was promulgated in London without objection, and from the language of the property agreement in 1944.

" I shall not set out the well-known authorities in which the application of rules of public policy have been considered. I shall refer only to the recent case of *Monkland* v. *Jack Barclay Ld.* ([1951] 2 K.B. 252), partly because Asquith L.J. puts the effect of the cases in a sentence, and partly because it has some similarity with some of the novel aspects of the plea of public policy in this case. The case was concerned with a scheme promulgated by the Motor Trade Association which sought to prevent by covenant a purchaser of a new car from reselling the car within a certain period after purchase. In form public policy was relied upon negatively; it was said that any contract which did not contain a restrictive covenant as required by the scheme was void as contrary to public policy. In substance it might be regarded as an attempt to use public policy as a positive force in support of the scheme. Asquith L.J., after referring to the specific classes of contracts which had been ruled contrary to the policy of the law, said: ' The courts have again and again said that, where a contract does not fit into one or other of these pigeon-holes, but lies outside this charmed circle, the courts should use extreme reserve in holding such a contract to be void as against public policy, and should only do so when the contract is incontestably and on any view inimical to the public interest. . . . It was suggested by Mr. Pritt that the Motor Trade Association's covenant scheme had the approval of the Government or government officials and that this was in some way relevant to the question whether a contract which departed from it was or was not contrary to public policy. It could only be so relevant if the Government's approval was some evidence that public policy called for the enforcement of the scheme. We think that this is an unfounded suggestion. What one government approves, its predecessor or successor may condemn; and, if the suggestion were acted on, precisely the same contract might have to be held void when government A was in power, and valid when government B was in power. The distinction between political policy and public policy was firmly drawn in *Egerton* v. *Brownlow* ((1853) 4 H.L.C. 1) where Lord Truro said that public policy " has been confounded with what may be called political policy; such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign States; with all which, as applied to the present subject, it has nothing whatever to do." For these reasons, in our view, the defendant's point on public policy is wholly unfounded.'

" The distinction that is there drawn between public policy and political policy seems to me to be equally applicable here.

No doubt one could formulate a broad rule of public policy that allied governments should be assisted in time of war. But the extent to which a particular decree serves that end seems to me to be entirely a matter for political decision by the Government of the day, which would have to consider whether all its provisions or some or none of them fitted in with their war policy. A power at war is not bound to regard everything that its allies do as politically desirable.

" There is another aspect of the matter with which I must deal because of the importance attached by the plaintiffs to the New York decision of *Anderson* v. *N.V. Transandine* ((1941) 28 N.Y.Supp. (2nd) 547). In that case the A.1 decree was enforced in the State of New York by Shientag J. upon the ground that since ' the public policy of the decree is in harmony with the public policy of the forum, the decree should be upheld by our courts under the principles of comity.' This was the reasoning which Atkinson J. accepted and followed. In the Court of Appeals ((1942) 289 N.Y.Rep. 9), where the decision was upheld, the Attorney-General of the United States was allowed to file a statement of public policy in which the enforcement of the decree was approved with reservations. The court did not pronounce upon the effect of that statement.

" This calls attention to another aspect of the argument submitted by the plaintiffs. If the approval and acquiescence of the British Government is relevant, I do not think that it is a matter to be inferred from their conduct. The only way for the court to ascertain such a matter, when it is relevant, is by making inquiry of the appropriate Minister. There is no precedent for that course in a case of this sort, and neither side has invited me to take it ; I think that it would be wrong and unnecessary. It is wrong, because it would put it in the power of the Crown to legislate in a way which might affect the rights of British subjects—for example, creditors of a foreign national —without the authority of Parliament. It is unnecessary, because the Government could in time of war swiftly and easily obtain from Parliament, if it had not already got them, such powers as Parliament thought necessary for enforcing as part of the law of England any foreign legislation which was in the common interest. It can then be fitted easily and with such modifications as may be expedient into the framework of our municipal law. This is the customary way of giving effect to international instruments such as treaties, and is in substance, if not in form, what was done by the Allied Forces Act, 1940. These considerations make *Anderson* v. *N.V. Transandine* appear to me to be a dangerous precedent to follow. Public policy appears to be in the hands of the New York courts a more flexible instrument than it is in this country. The reference by Shientag J. to *United States* v. *Belmont* ((1937) 301 U.S. 324) suggests that the public policy of the United

States, or of the State of New York, does not necessarily exclude even confiscatory legislation.

" In my judgment it would be unwise, in the light of these considerations and of the authorities, to propound as a new rule of public policy the principle for which the plaintiffs contend. I need hardly say that it is only after much thought that I have rejected the guidance given by the decision of Atkinson J. in *Lorentzen* v. *Lydden & Co. Ld.*; and I have done so only because upon reflection I think that it cannot be made to conform with the authorities which regulate the use of public policy. In this respect I may say that I have had from the Solicitor-General the benefit of a much fuller and more able presentation of the relevant considerations than Atkinson J. had in the unsuccessful argument before him.

" I have been dealing with public policy as a force which has to be invoked by the plaintiffs in order to succeed. Many of these considerations would also apply on the first part of the argument. If foreign legislation is as a general rule to be admitted, it would have to be excluded when politically harmful; and the difficulty of formulating any satisfactory principle of exclusion is in my view a formidable argument against the validity of the rule. In my judgment the claim against the custodian fails."

His Lordship then turned to deal with the claim against the Administrator. This depended upon whether the property in question was property chargeable under the terms of the Peace Treaty with Hungary and the Treaty of Peace (Hungary) Order, 1948. On these questions he said:

" Paragraph (3) [of the Order], which contains the crucial definition of ' property, rights and interests,' is textually wider than article 29 of the Treaty from which it presumably derives, notably in adding to the word ' belonging to ' a Hungarian national the words ' or held or managed on behalf of '. Whether it is merely being more explicit, or whether it is intended to enlarge the definition of Hungarian property, is one of the questions which has been discussed. If on its true construction it enlarges the definition of Hungarian property, the plaintiffs say that the order is *ultra vires* the Treaty of Peace Act. The administrator answers that the order contains the Crown's interpretation of the Treaty which cannot be challenged in any court of law. The plaintiffs, while disputing this, rejoin that if the Crown has exclusive rights of interpretation and has exercised them by adding words to the definition in the Treaty, the extended definition must be taken to be as comprehensive as the Crown desires and to be expressed in words which do not require to be stretched beyond their ordinary meaning seen in the light of ordinary English legal principles. The point is a shrewd one, for the administrator, as will be seen, pleads for an exceptionally wide construction of paragraph (3) of the order.

Case No. 40 *Contd.*

"Before construing paragraph (3) it is necessary to ascertain what classes of property rights and interests are introduced into the paragraph by sub-paragraph (ii) as having been 'subject to control'. The class is enemy property as defined in the Trading with the Enemy Act, 1939, s. 7, and that is 'any property for the time being belonging to or held or managed on behalf of an enemy or an enemy subject.' The sub-paragraph is indeed more comprehensive than the main paragraph. First, it includes the property of territorial enemies, if I may use that term to describe persons who, whether Hungarian nationals or not, were enemies because of their residence in Hungary. It includes also property of persons who are not Hungarian nationals in another respect, that is property belonging to companies which were controlled by residents in Hungary. This is because of the wide definition of territorial enemies given in section 2 of the Act. Secondly, whereas for the purpose of the main paragraph the belonging, holding or managing would have to exist at the time when the order came into force, namely, on February 2, 1948, for the purpose of the sub-paragraph it can have existed at any time, so long as there was some moment in the past at which, by virtue of the belonging, holding or managing, the control attached. This enables the administrator, as he claims, to dispense with any investigation into the nationality and interests of the Baron's descendants; he can say that it was sufficient that from 1941 to 1947 the property was subject to control by virtue of the Baron's nationality. Lastly, it is said that the words derive a wider meaning from their context in the Trading with the Enemy legislation than they might otherwise have.

"All these points of interpretation are contested by the plaintiffs. But it is plain that the sub-paragraph is at least as wide as, if not wider than, the main provision; and that the question that arises under each is whether the gold and bank balances were property belonging to the Baron or held or managed on his behalf.

"The administrator's proposition is that for the purpose of the order property owned by a company belongs to its shareholders, or alternatively is held or managed by the company on behalf of its shareholders. I must say that, if the skilful contentions of the Solicitor-General and Mr. Upjohn had not proved the contrary, I should have thought this proposition to be beyond the reach of sustained argument. It seems to me to be contrary to all authority and principle. But the argument to which I have listened deserves, and the amount at stake justifies, a detailed consideration of the point."

His Lordship then discussed *Saloman* v. *Saloman & Co.* ([1897] A.C. 22), *Macaura* v. *Northern Assurance Co. Ld.* ([1925] A.C. 619), *E.B.M. Co. Ld.* v. *Dominion Bank* ([1937] 3 All E.R. 555), all clear authorities that a company's property is distinct from that of its shareholders. Moreover, this principle applied even for the purposes of Trading with the Enemy legislation so far as questions of property were concerned: see Lord Parker in *Daimler Co. Ld.* v. *Continental Tyre & Rubber Co.* (*Great Britain*) *Ld.* ([1916] 2 A.C. 307) and Lord Sterndale in *The Noordam* (No. 2), ([1919] P. 255). He continued:

" It is worth noting, when a document of an international character is being indirectly construed, that these principles are not peculiar to English law. The point was considered by an international tribunal, the Permanent Court of International Justice, in *Standard Oil Company's Claim*,[1] where it declares that [2] ' the decisions of principle of the highest courts of most countries continue to hold that neither the shareholders nor their creditors have any right to the corporate assets other than to receive, during the existence of the company, a share of the profits, the distribution of which has been decided by a majority of the shareholders, and, after its winding up, a proportional share of the assets.' "

His Lordship next considered the meaning of " belonging " as used in paragraph 3 of the Order. He rejected the argument that it might be given an extended and vague connotation and decided that it must denote ownership, which was the ordinary meaning of the term. In any case it was idle to seek to extend the meaning of " belonging " unless one could find some property right or interest to which it could attach. That a shareholder had no such property right or interest in any of the assets of the company was therefore fatal to the Administrator's case. Moreover, looking at the Order as a whole and at the Treaty, there was nothing to compel the adoption of an unusual meaning for " belonging ". On the contrary, an extended meaning would make the administration of the Order almost impossible.

After illustrating the practical difficulties which would arise in the administration of the Order if the property or assets of the company were to be said in any sense to " belong " to its shareholders, His Lordship then turned to consider the phrase " held or managed on behalf of ". It had been contended that these words must be intended to add something to " belonging " and it had been suggested that they indicated the legal relationship which exists between a majority shareholder and the company, for this created a *nexus* consisting of a right of control which enabled the shareholder by means of a winding up to get the property of the company into his own hands. In this way the company might be said to hold property " on behalf of " the shareholder. And this wider meaning, it had been argued, must be given to the phrase because of its place in the Trading

---

[1] *British Year Book of International Law*, 8 (1927), p. 156.

[2] *Ibid.* 162.

Case No. 40 *Contd.* with the Enemy Act, 1939, for Parliament could not have intended for this purpose to catch the property of the enemy national but not the one-man company through which he might operate.

This contention for a wide meaning to be given to the phrase could not be sustained. In the first place, one could not escape from the fact that the object of the Order was to give effect to the Treaty, in which only the word " belonging " was used. Had the Order intended to add to the class covered by " belonging ", it would have become almost contradictory, for Article 1 of the Order gave legal effect to the Treaty itself. The better interpretation was that " held or managed " was intended as a slight expansion or elucidation of the word " belonging " and not as introducing a new and independent addition.

Secondly, the place of the phrase " held or managed on behalf of " in the Trading with the Enemy Act and the consideration of that legislation as a whole offered no encouragement to the construction suggested by the Administrator. On this point his Lordship said : " The main object of the Act is to deal with territorial enemies. The power that is taken over the property of enemy subjects is one which, I should infer, was only intended to be exercised in exceptional cases ; and I am told that in practice it has been used only in that way. If it had been exercised ruthlessly, a Hungarian subject in this country, who had resided here for many years and whose loyalty was above suspicion, might have been stripped of every asset he here possessed. The same thing would have happened to refugees who had sought refuge from oppression in this country or in neutral territories. It is not therefore surprising if Parliament thought that a power of this sort need not be developed to the extent of including one-man companies. If in an exceptional case a Hungarian was found to be operating in England or in neutral territory through a one-man company to the national disadvantage, there are plenty of ways under the Act in which he might have been dealt with. If it was an English company, control of it could have been obtained by the vesting of all the shares in the custodian. If it was a neutral company, its name could have been placed on the black list under section 2 (2) of the Act of 1939. Or a restriction order might have been made under section 3A of that Act (see Defence (Trading with the Enemy) Regulations, 1940, reg. 3A).

" It would not therefore be startling to find that the one-man enemy-subject company was not made a specific objective. What would be surprising is that if such a company was intended to be covered, it was not covered in express words. The notion of the enemy character of a corporation was, of course, present to the mind of Parliament, and in section 2 of the Act the conditions of control by a territorial enemy which give the corporation an enemy character are clearly laid down. It is most unlikely that if Parliament had intended to give an enemy character to corporations controlled by an enemy subject, it would not have had recourse to the same formula. ' Enemy subject ' is defined in section 15 and it includes as well as an individual a company incorporated in or under the laws of an enemy State ; that is to say, it picks out paragraph (*d*) in section 2(1) and omits paragraphs (*c*) and (*e*) of the Act of 1939 (see Defence (Trading with the Enemy) Regulations, 1940, reg. 3). Nothing would have been simpler than to have included in the definition a reference to the apparatus of control devised in paragraphs (*c*) and (*e*).

" Finally, there is no precedent for describing the suggested legal *nexus* as a relationship which can be comprehended by the words ' on behalf of '. While the proposition might in loose talk pass muster in the case of the 100 per cent. shareholder, it will not, I think, bear analysis if there is any minority, however small. This is important, not only because the administrator makes his argument wide enough to cover at least the majority shareholder, but because of the light it throws on the truth of the proposition itself.

" Take the case of a shareholder who holds 51 per cent. It does not matter for this purpose whether he has 51 per cent. or 99 per cent., so long as his holding is sufficient to put the company into liquidation so that his rights of control in relation to the property of the company are the same as those of a 100 per cent. shareholder. In such a case it can hardly be said that the company holds or manages all its property for the 51 per cent. shareholder, so it is argued that the company holds or manages 51 per cent. of its property for the 51 per cent. shareholder and 49 per cent. for the other shareholders. What property is in these circumstances subject to the charge I do not pause to inquire. If the true view be that the company holds its property proportionately as much for the minority as for the majority shareholder, what becomes of the special *nexus* of control which is said to constitute a peculiar relationship ? If two shareholders between them hold 51 per cent. of the company's shares and thus can obtain a winding up if they want it, does the company own 25½ per cent. of the property for each of them ? If so, then the company holds its property on behalf of any number of shareholders who may at any time constitute the majority, which is the same thing as saying that it holds the property on behalf of any or all of them. I cannot think that out of the conception of control of a company there can be derived anything which can be comprehended in the relationship created by ' on behalf of '.

" In reviewing these arguments, I have so far ignored the formidable factor of creditors. The defendants say that the

Case No. 40 *Contd.* creditors of a company, whether they be debenture holders or otherwise, so long as they have no charge on any specific asset, must be ignored. The justification for this is said to be that it is what would happen in the case of an enemy individual. In his case all his unsecured property would be taken and the creditors would be left with nothing. I do not think the interposition of a company can be obliterated by the use of this analogy. The whole argument for the administrator is that ' belong ' is used to get at the person whom the man in the street would say the property really belonged to. If a company owed more than the value of its assets, I do not think that the man in the street would say that its property ' belonged ' to the shareholders—certainly not the man in any City street. Similarly, if property is held or managed on behalf of a 100 per cent. shareholder because he could obtain a liquidation, one cannot ignore that what he obtains on a liquidation is no more than the property after the creditors have been satisfied.

" In the end it appears to me much as it did in the beginning. No doubt the legislature can forge a sledgehammer capable of cracking open the corporate shell ; and it can, if it chooses, demand that the courts ignore all the conceptions and principles which are at the root of company law. But the phrase ' belonging to or held or managed on behalf of ' is too mild a weapon for that purpose. It is worth nothing that in similar cases of the distribution of enemy property where the legislature has required the sort of effect for which the administrator is here contending, it has said so specifically. Out of several examples cited in argument I need refer only to the Distribution of German Enemy Property Act, 1949, and to the definition of ' German enemy property ' contained in section 8(1).

" For these reasons the plaintiffs are entitled in my judgment to recover their property from the administrator."

[Report : L.R. [1953] 1 Q.B. 248.]

Note.—The Custodian had invested the proceeds of the sale of the gold, and it was conceded by him and the Administrator that as a result of this judgment the Bank was entitled to recover the income derived from these investments, as well as the capital sum representing the proceeds of the sale. The Bank claimed that that income should be paid over to it without any deduction for income tax, and the case was restored to the list for the determination of this question. Devlin J. accepted the Bank's contention. The Administrator appealed on this point. The Custodian, being no longer interested, took no part in the appeal.

The Court of Appeal (Evershed M.R., Denning and Romer L.JJ.) reversed the decision of Devlin J. on this tax point. They said, first, that the office of Custodian of Enemy Property was not such as of itself to confer upon its holder the Crown's immunity from tax. Secondly, during the period of retention of the gold and its proceeds by the Custodian, the rights and interest of the Bank were not wholly extinguished. By virtue of the provisions of the Trading with the Enemy Act, 1939, and the Orders made thereunder, such rights were in statutory suspense, that is to say, could not be asserted and enforced during the war. The beneficial interests of the Bank were liable to be wholly defeated and extinguished, but pending any order to that effect they persisted throughout the period of the Custodian's retention. The preservation of the interests of the Bank in the proceeds of sale in question, however remote their character, made it impossible to say that the same were held exclusively for public purposes. The Custodian held the sums for the purposes of preservation defined in the Act of 1939. Thirdly, the deduction of tax did not touch and affect the personal or prerogative right of the Crown and such deduction was rightly made (see L.R. [1953] 1 Q.B. 279–299).

The Bank then appealed to the House of Lords, who upheld the appeal and reversed the decision of the Court of Appeal (L.R. [1954] A.C. 584). The decision of the House of Lords, in so far as it concerns the effect of trading with the enemy legislation, will be reported in the 1954 volume of the *International Law Reports*.

It should be noted that the appeals were confined to the question of tax and did not affect the above decision by Devlin J. on the substantive question.

Jurisdiction—Jurisdiction to Wind up Foreign Corporation—Foreign Bank Dissolved in Country of Incorporation—Winding-Up Order in England—Action by Liquidator Against Creditors—Foreign Corporation having No Specific Place of Business in England—Whether Assets and Creditors in England Sufficient to Found Jurisdiction. **Case No. 41**

BANQUE DES MARCHANDS DE MOSCOU (KOUPETSCHESKY) *v.*
KINDERSLEY AND ANOTHER.

England, Court of Appeal.
(Evershed M.R., Singleton and Jenkins L.JJ.)
July 14, 1950.

THE FACTS.—The plaintiff company, Banque des Marchands de Moscou (Koupetschesky), were formed in 1866 under the laws of the Russian Empire to carry on the business of bankers in Moscow and elsewhere in Russia. In 1918 the Russian banks were dissolved by decrees of the Soviet Government and ceased to exist. On May 30, 1932, Eve J., purporting to act under the Companies Act, 1929, s. 338, made an order winding up the bank. At that time the effect and dates of the Russian decrees had not been established in the English courts.

On September 9, 1949, this action was brought by the liquidator of the Bank by leave of the Registrar of Companies under s. 191 of the Act of 1929 against the defendants as being the only surviving partners of the firm of Lazard Bros. & Co. for the sum of £28,990 11s. 1d. claimed as the consolidated balance

Case No. 41 *Contd.*

due on the accounts between the Bank and the firm. On March 8, 1950, the defendants took out a summons asking for an order dismissing the action on the ground that the Bank was non-existent and that the action had been begun without proper authority, and for an order for costs against the liquidator or the solicitors by whom the writ was issued. Notwithstanding this, the defendants had themselves sought to prove in the liquidation for the sum of £26,000 alleged to be the true balance owing to the firm on the account. There was evidence that the Bank never had an office or place of business in England and that they did not at any time carry on business in England through a branch or by agents.

Harman J. dismissed the procedure summons on the ground that the defendants were seeking to approbate and reprobate as they were trying to prove in the liquidation and at the same time claiming that it was a nullity. He held, further, that the fact that the company had assets in this country was a valid ground for making the winding-up order having regard to s. 338, sub-s. 1, of the Companies Act, 1929.[1] The defendants appealed.

Held: that the appeal failed. (1) There was here no case of approbation and reprobation, for the defendants had made no election from which they could not resile, and they would not be regarded as having elected unless they had taken a benefit under or arising out of their course of conduct; (2) if proof of the conduct of business in England by the Bank were a condition necessary to the existence of jurisdiction in the English courts to wind up the Bank under the Companies Act, 1929, s. 338, sub-s. 1 (*d*)(i), that condition was on the evidence satisfied; but (3) in the case of a foreign corporation (such as the Bank) which had been dissolved and extinguished in the country in which it was established, it was not necessary as a statutory condition of jurisdiction in the English courts to wind them up to prove that they had, before their dissolution, established at some place in England a branch or other business place, and that that business had ceased: it was sufficient that there were assets of the Bank in this country, and persons here claiming as creditors of the Bank or said to be indebted to it, as being indicia of a business in some sense formerly conducted in England.

---

[1] Companies Act, 1929, s. 338, sub-s. 1: "Subject to the provisions of this part of this Act, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions . . . (*d*) The circumstances in which an unregistered company may be wound up are as follows: (*i*) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs. . . ."

. Sub-section 2: "Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated."

On the question of jurisdiction to wind up a company which has been dissolved in its country of origin, Evershed M.R. said : " Sub-s. 1(*d*)(i) of s. 338 of the Act of 1929 [under which the present winding up order had been made] provided as follows : ' The circumstances in which an unregistered company may be wound up are as follows :—(i) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs '. This form of words is substantially identical with that which has consistently appeared in all the relevant legislation since the Act of 1848 (11 & 12 Vict. c. 45). As a matter of language, it is plain that the three conditions named are independent and not cumulative. Assuming, therefore, in the case of a foreign corporation which has by its local law been extinguished, that it is covered by the words ' is dissolved '—which words must, as it is conceded, be taken to mean ' has been dissolved '—it would appear from the language used that no other condition has to be fulfilled in order to confer upon the English court jurisdiction to wind it up.

" As a matter of general principle, our courts would not assume, and Parliament should not be taken to have intended to confer, jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries. There must be assets here to administer and persons subject, or at least submitting, to the jurisdiction who are concerned or interested in the proper distribution of the assets. And when these conditions are present the exercise of the jurisdiction remains discretionary. Prima facie if the local law of the dissolved foreign corporation provided for the due administration of all the property and assets of the corporation wherever situate among the persons properly entitled to participate therein, the case would not be one for interference by the machinery of the English courts. In the present case there are substantial assets standing in the name of the bank or its liquidator, and there are persons within the jurisdiction having claims to participate in the distribution of those assets. At the same time, by reason of the total extinction in Russia of the bank and the absence of any machinery under Russian law for the due distribution of the assets among the persons regarded as properly having claims upon them, there would be, unless the machinery of winding up under the Companies Act is available, no means of any kind existing for the administration of the English assets.

" The existence of assets here, the presence here of persons claiming as creditors of the bank or said to be indebted to them, seem to constitute at least the indicia of a business in some sense formerly conducted here. Where, therefore, the

Case No. 41 *Contd.* circumstances exist which, upon the general principle above referred to would make the case appropriate for the exercise by our court of its winding up jurisdiction, it would appear that the question whether the foreign corporation carried on business in this country would generally be academic, unless it is also necessary to show that that business was carried on directly and from some established or specified place or places in this country.

" The question was considered by Cohen J. in the *Rabenek* case ([1944] Ch. 404, 409). In that case it was not disputed that the dissolved Russian company had formerly carried on business in England ; but it was argued for the Crown (who appeared on the petition) that it would be necessary to show, in order to found jurisdiction to wind up the company, that the company had had an office or other established place of business in this country. The judge, in my opinion rightly, rejected that argument. But he was also of opinion that the dissolved foreign or unregistered corporation must have had a ' place ' of business in this country of some kind. ' The provisions ', he said, ' of s. 338, sub-s. 1 [of the Act of 1929], in my opinion make it clear that an unregistered company cannot be wound up under Part X of the Act, unless it has a place, not an established place, of business in Great Britain, for, unless it has such a place of business, no question can arise whether the place of business in England or the place of business in Scotland is the principal place of business.' In the case before him the judge was able to surmount the difficulties in the petitioner's way by arriving at the somewhat artificial conclusion that the Midland Hotel, Manchester (where the company's agents were proved to have stayed when visiting England and transacting business), must be treated as having been the company's ' place ' of business in England : and I have already given my reasons for thinking that, if this requirement must be satisfied in the present case, then, since Czamanski has stated that he visited England from time to time on the business of the bank and must, on such occasions, have stayed somewhere in England, it is sufficient that the place or places (though unspecified) where he stayed constituted the bank's place or places of business in England. But, in my judgment, it is not necessary, in order to found jurisdiction, to prove that the dissolved foreign corporation had any specified or identifiable ' place ' or ' places ' of business in England. It is true that in paras. (*a*) and (*b*) of the subsection reference is made to the consequences which follow ' if it has a principal place of business ' in England or Scotland or both. But it does not, in my judgment, follow that the courts in England (or Scotland) have no jurisdiction to wind up a dissolved foreign corporation if it is not shown to have had a principal or any place of business in either.

" In the *Rabenek* case ([1944] Ch. 404) Cohen J. referred to

In re Lloyd Generale Italiano (29 Ch.D. 219), and quoted at length the judgment in that case of Pearson J. That judgment, and more particularly the sentence in it, 'I am decidedly of opinion that the Act is confined to English companies and foreign companies carrying on business in England with, so to speak, a residence of their own—a branch office—in this country', has constituted the authority for the view expressed by the text-book writers that the existence of such a 'residence' was necessary to found the jurisdiction of our courts to wind up a dissolved foreign corporation. . . .' As observed by Cohen J., not only in the case cited had there been no place of business of any kind in England, but there were no assets in England—nothing which the English court could in any case administer. In my judgment *In re Lloyd Generale Italiano* (*Ibid.*) ought not to be regarded as an authority for the view that proof of the existence of a 'place' of business in England, whether established or otherwise, is a condition to the existence of jurisdiction in the English court to wind up a dissolved foreign corporation.

"I have so far discussed the matter by reference only to sub-s. 1 of s. 338 and without regard to sub-s. 2. The latter sub-section is as follows: 'Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this part of this Act notwithstanding that is has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.'

"There can be no doubt, having regard to the history of the sub-section, that it was enacted with particular reference to the problems which arose as a result of the Russian revolutionary legislation affecting Russian corporations. And if the matter were free from authority there would, as it seems to me, be much to be said for the argument that, sub-s. 2 having been introduced into the section, that sub-section and sub-s. 1 must be read and construed together; with the result that, notwithstanding the wide and general terms of para. (*d*)(i) of sub-s. 1, all cases (and particularly the Russian cases) falling within the terms of sub-s. 2 must be treated as governed exclusively by that subsection and subject, therefore, to the limitation (whatever might be its effect) of the phrase 'which has been carrying on business in Great Britain, etc.' When *In re Russian and English Bank* ([1932] 1 Ch. 663) came before Bennett J. he was of opinion that the words 'ceases to carry on business in Great Britain' must be strictly construed to refer only to the future. He held, therefore, that the sub-section could have no application to a case where the Russian company concerned had long since ceased to carry on such business; and, treating the sub-section as not intended to alter the existing law, made a winding-up order under sub-s. 1(*d*)(i), a precedent which appears, as I have said, to have since been consistently followed. The latter part of Bennett J.'s conclusion (though not the former) was accepted by Cohen J. in the *Rabenek* case ([1944] Ch. 404), and has also received support in the House of Lords in *Russian and English Bank* v. *Baring Bros & Co.* ([1936] A.C. 405), in which it was decided that where a winding-up order has been made in regard to a dissolved Russian corporation, and the necessary leave has been obtained (as in the present case) from the Registrar in Companies Winding-up, the liquidator can bring an action in the name of the foreign corporation notwithstanding that it is a mere nominis umbra, that it has altogether ceased as an entity to exist."

His Lordship then cited passages from the speeches of Lords Blanesburgh, Atkin and Macmillan in the *Baring Bros.* case, and continued :

" In the light of the judicial pronouncements to which I have referred in the House of Lords, and also those of Cohen and Bennett JJ., Parliament re-enacted in ss. 399 and 400 of the Companies Act, 1948, the exact language of sub-ss. 1 and 2 of s. 338 of the Act of 1929. It follows in my judgment that sub-s. 2 of s. 338 must be regarded as expository only and as not having been intended to give jurisdiction to wind up dissolved foreign corporations (such as the plaintiff bank) subject to special limiting conditions not applicable to the more general jurisdiction conferred by sub-s. 1 ; and that by the opening words in sub-s. 2, ' where a company incorporated outside Great Britain which has been carrying on a business in Great Britain . . .' is intended (subject to the suggestion of Jenkins L.J.) no more than a reference to the fact that some commercial subject-matter on which a winding-up order can operate is a natural and necessary requisite for the exercise of winding-up jurisdiction.

" In my judgment, therefore, the language of sub-s. 2 does not qualify the conclusion which I have reached on sub-s. 1. I think that, in circumstances such as exist in the present case, it is unnecessary as a foundation for a winding-up order to prove that the bank had any branch or office in England or carried on their business operations in England from some established or specific or identifiable place of business ; and that Eve J. had jurisdiction to make the order which he made in May, 1932, apart from the matter on which he expressly relied. It follows from the *Baring Bros.* case ([1936] A.C. 437) —and it is not disputed—that the present liquidator was entitled to institute the action in the name of the bank, and that the defendants' application fails."

Singleton and Jenkins L.JJ. agreed.

[Report : L.R. [1951] 1 Ch.D. 112.]

NOTE.—This case, which is on the border-line of public and private international law, has been included because of the prominence of the jurisdictional issue and also for the sake of preserving continuity in respect of similar cases previously reported.

Jurisdiction—Extra-territorial Operation of Legislation—Personal Injuries (Emergency Provisions) Act, 1929—Injuries caused during Accident to British Aircraft Abroad. **Case No. 42**

HOWGATE *v.* BAGNALL AND ANOTHER.

England, High Court of Justice, King's Bench Division.
(Barry J.)
November 3, 1950.

THE FACTS.—A British aircraft belonging to His Majesty attempted to land on an airfield in India, crashed and caught fire. A passenger, a British subject, was killed. In an action for damages in respect of his death, the captain and second pilot admitted negligence but pleaded that no action lay because the injuries were " war injuries " within the meaning of s. 8, sub-s. 1, of the Personal Injuries (Emergency Provisions) Act, 1939, *viz.* " injuries . . . (*b*) caused by the impact on any . . . property of . . . any aircraft belonging to . . . His Majesty. . . ." The plaintiff contended, *inter alia*, that the Act did not have extra-territorial operation and could not therefore apply to this case.

Held: that the plaintiff's claim must succeed. The judgment of Barry J. is mainly concerned with showing that the injuries in this case did not properly come within the meaning of " war injuries " in the Act of 1939, and this part of the decision raises no point of international law. Barry J. did, however, express *obiter* the opinion that the Personal Injuries (Emergency Provisions) Act, 1939, had extra-territorial operation. On this point he said :

" Mr. Scott Henderson contended that the Personal Injuries (Emergency Provisions) Act, 1939, had no extra-territorial application, and that injuries sustained outside the United Kingdom did not fall within any of its provisions. He based this argument on the broad proposition set out in Maxwell (9th ed.), p. 149 : ' In the absence of an intention clearly expressed or to be inferred either from its language, or from the object, subject-matter, or history of the enactment, the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom '.

" This passage, which is well supported by authority, was cited with approval by Cozens-Hardy, M.R., in *Tomalin* v. *S. Pearson & Son Ld.* ([1909] 2 K.B. 61, 64), when the Court of Appeal applied this principle to the Workmen's Compensation

Case No. 42 *Contd.*

Act, 1906. *Tomalin*'s case ([1909] 2 K.B. 61, 64) was followed in *Schwartz* v. *India Rubber, Gutta Percha and Telegraph Works Co. Ld.* ([1912] 2 K.B. 299).

" These two decisions of the Court of Appeal have been criticized in *Keegan* v. *Dawson* ([1931] I.R. 232), but they are, of course, binding on me ; and *Tomalin*'s case was cited with approval by the Privy Council in *Krzus* v. *Crow's Nest Pass Coal Co. Ld.* ([1912] A.C. 590). They have, however, no direct bearing on the construction of the Act now under consideration, more especially as the Court of Appeal, in arriving at their decisions, were strongly influenced by certain provisions contained in s. 7 of the Workmen's Compensation Act, 1906, which have no counterpart in the Personal Injuries (Emergency Provisions) Act, 1939.

" Were it material to the decision of the present case, I should have felt bound to accede to the submission of counsel for the defendants that the general scheme of the Act of 1939 and the conditions of universal war which existed, or seemed likely to exist, at the time when it was passed, all tend to show that its application is not to be confined to the narrow territorial limits of the United Kingdom. I think that the Act applies to all British subjects who suffer ' war injuries ' within the meaning of the definition, in any part of the globe. Counsel for the plaintiff pointed out that this construction of the Act might enable a British subject resident in the United States of America to recover compensation if he were injured by the impact of an American aircraft. If this were so, it would perhaps throw some doubt on the construction that I have indicated ; but in my judgment Parliament has provided against such absurdities by enabling the Minister to specify in his scheme the classes of persons entitled to benefit under it.

" In fact various schemes made under the Act have imposed stringent limitations on the classes of persons who may obtain awards of compensation for injuries sustained outside the United Kingdom.

" I cannot, of course, have recourse to these schemes as a guide to the correct interpretation of the Act under which they were made, but I am, I think, entitled to consider them for certain limited purposes. In *Billings* v. *Reed* ([1945] K.B. 11, 17) Lord Greene, M.R., said, in reference to a scheme made under the Act : ' The fact that the object of this Act was in substance what I have suggested can be seen from a consideration of the way in which the scheme has been formed pursuant to the Act itself and with the tacit approval of Parliament as provided in the Act. At any rate, we are entitled to look at the scheme for the purpose of seeing the kind of practical treatment of these questions which Parliament has authorized.'

" It is abundantly clear from the wording of the various schemes made under the Act that the Minister, with the tacit consent of Parliament, has throughout considered that 'war injuries' may be sustained outside the United Kingdom, and counsel for the plaintiff has been forced to contend that, if his submission is correct, all these schemes have contained many provisions that were *ultra vires*. As already indicated, I cannot accept this view.

"Finding as I do that the Act of 1939 applies to 'war injuries' sustained by British subjects outside the United Kingdom it is unnecessary for me to consider an alternative submission made by counsel for the defendants that, irrespective of the territorial application of the Act, this section was in any event barred by s. 3, sub-s. 1, on the ground that the event which caused the deceased's injuries was not actionable in this country. I am, however, very far from being convinced that the defendants could have availed themselves of this section if the deceased's injuries had not been 'war injuries' to which the Act applied."

[Report: L.R. [1951] 1 K.B. 265.]

Jurisdiction—Extra-territorial Effect of—Confiscatory Legislation—Territorial Limitation of—Expropriation of Assets of Insurance Company—Insurance Company as Mortgagee—Transfer of Assets to State Enterprise—Whether Mortgage Debtors Liable to Original Mortgagee or State Enterprise. **Case No. 43**

EXPROPRIATION OF INSURANCE COMPANIES CASE.

German Federal Republic, Higher Court of Appeal (Kammergericht) of West Berlin.
December 15, 1950.

THE FACTS.—The defendants, an insurance company incorporated in Germany, were the owners of certain mortgages secured on real property situate in a part of Saxony (Germany) which, on the conclusion of hostilities in the Second World War, became Soviet-occupied territory. By an Ordinance dated December 30, 1946, all property owned by insurance companies and situate in Soviet-occupied Saxony (with the exception of negotiable instruments) was confiscated and vested in a State enterprise, the plaintiffs in this case. Some of the company's mortgage debtors were resident in West Berlin, which did not form part of the Soviet zone of occupation; and being uncertain as to whether they were liable to pay their mortgage debts to the original mortgagees, the defendants herein, or to the newly established State enterprise, the plaintiffs herein, they deposited the moneys they owed—as they were entitled to do—with a court in West Berlin. In this action the plaintiffs brought an action against the defendants

Case No. 43 *Contd.* claiming the consent of the latter to the payments being made to them, the plaintiffs, as mortgage creditors. The claim was resisted on the ground that the Ordinance of December 30, 1946, was limited to Soviet-occupied Saxony in its territorial application and therefore incapable of vesting the mortgage debts in the plaintiffs. The Court of first instance accepted this contention and dismissed the action. The plaintiffs now appealed.

Held: that the Ordinance purporting to confiscate the property of the defendants was confined to Soviet-occupied Saxony in its territorial application and therefore incapable of vesting the mortgage debts in the plaintiffs, and that the appeal must accordingly be dismissed. The Court said:

" We cannot allow a ' system of law ' to triumph, the basis of which ' violates constitutional principles, good morals and the objects of existing legal enactments '. This point of view must, without any doubt, prevail in favour of the defendants. They have been expropriated without payment of compensation. Such expropriation cannot possibly be reconciled with the principles underlying a democratic State (*Rechtsstaat*). The principle of the protection of property is also contained in the Constitution of Berlin of September 1, 1950. We may here refer to Article 15A, which guarantees private property and according to which expropriation can take place only on the basis of law. The expropriation of the defendants which has been decreed in Saxony is an act of pure caprice, and it violates constitutional principles. Furthermore, its amoral character may be inferred from the fact that the creditors of the defendants have been deprived of their rights as a consequence of the expropriation of the defendants; they are now absolutely precluded from touching the assets of the defendants which have been taken over by the plaintiffs. If a court of the Eastern zone were to give a judgment against a debtor resident in West Berlin, we could not, if that judgment was based on an expropriation without payment of compensation, deny to the debtor the protection of the Law of May 31, 1950.[1] Having regard to these principles embodied in the legislation of Berlin, no court exercising jurisdiction in Berlin can recognise legal results based on measures which violate constitutional principles, good morals or the object of existing legal enactments."

[Report: *JZ*, 6 (1951), p. 367.]

---

[1] This Law provides for the protection of judgment debtors resident in West Berlin against the execution of judgments given against them by courts of the Soviet zone of occupation.

Jurisdiction—Extra-territorial Effect of—Confiscatory Legislation—Territorial Effect of Liquidation of Trading Company—Sale of Property of Company to Third Person in Country where Liquidation Decreed—Removal of Property to Foreign Country—Whether Original Owners Entitled to Claim Property in Foreign Country. **Case No. 44**

CONFISCATION OF MACHINE (GERMANY) CASE.

German Federal Republic, Hanseatic Court of Appeal, Hamburg. May 8, 1951.

THE FACTS.—A company registered and carrying on business in Thuringia, a part of Germany occupied by the Soviet Union, was compulsorily liquidated by governmental decree, all its property being confiscated without payment of compensation. The company did not carry on business in Western Germany which was occupied by countries other than the Soviet Union, and it did not own property there. After the liquidation of the company in Thuringia a machine forming part of its property was sold to a third party in Thuringia, in accordance with the general legal provisions of the German Civil Code applicable there as well as in the other parts of Germany. A member of the company, who was resident in Western Germany, discovered that the machine had been brought there, and in this action he claimed its delivery from the person in possession thereof. On behalf of the defendant it was contended (i) that the plaintiff had no *locus standi*, on the ground that the company was no longer in existence, and (ii) that, in any event, as the confiscation of the machine was lawful under the law of Thuringia, the *locus in quo* of the machine at the time of confiscation, and as subsequently there had been a sale of the machine to a third person in Thuringia, the plaintiff was no longer entitled to claim ownership thereof. On behalf of the plaintiff it was contended (i) that he, as the only member of the company resident in Western Germany, was the person entitled to bring this action, and (ii) that the confiscation of the machine was contrary to " public order " (*ordre public*) and that any change of ownership resulting therefrom was therefore invalid in Western Germany.

Held: (i) that, the company having ceased to exist, the plaintiff was not entitled to bring the action ; (ii) that, quite apart from the inability of the plaintiff to bring the action, the confiscation was valid under the law of Thuringia where the machine was at the time of confiscation, and that accordingly recognition could not be denied to the change of ownership, more particularly as subsequently there had been a sale

Case No. 44 *Contd.*

thereof to a third person. The action must therefore be dismissed. The Court said:

". . . According to the general consensus of opinion in jurisprudence and doctrine measures of confiscation, even when taken without payment of compensation, must be given effect to in so far as they concern property situate in the country where such property is confiscated, and confiscated property which is subsequently removed to another country cannot be claimed by the former owner. There is no reason to depart from this practice in the present case because there is no such connection with this country [1] as would be required for the application of Article 30 of the Introductory Law to the Civil Code.[2] The confiscation is concerned with property which was situate in Thuringia at the time of confiscation and for some time thereafter. The applicant is a company registered in Thuringia, and its members, with the exception of one member who after the confiscation moved to Western Germany, are still living in Thuringia. The fact that the machine has meanwhile been brought to Western Germany and that the matter has been submitted to a court in Western Germany is not sufficient in itself to constitute a close connection with this country. In fact, the determination of the validity or otherwise of the confiscation is only a preliminary question. When the confiscation had taken place the machine was sold to a third party in the Eastern zone. The act of confiscation as such had been fully completed. The subsequent purchasers had acquired a secure position by virtue of transfers which took place in accordance with the provisions of the Civil Code before the property reached the territory of Western Germany. In view of these circumstances the preservation of the position as now existing does not undermine the basis of the West German legal system to such an extent as would require the application of Article 30 of the Introductory Law to the Civil Code which can be called in aid within the framework of private inter-zonal law only with great caution, in order to prevent, as far as possible, conflicting developments of the legal systems of Eastern and Western Germany. Different considerations might apply if a court in Western Germany were to be asked to bring about the result intended by the act of confiscation, *viz.* if the person in whose favour property has been confiscated in Thuringia were to claim the confiscated property in a court of Western Germany from the former owner who has removed the property to the territory of Western Germany in order to save it from being seized by the authorities of Thuringia. This, however, is not the position here. . . . The saving provision contained in Article 30 of the Introductory Law to the Civil Code cannot, therefore, be prayed in aid, with the result that the applicant can no longer be regarded as the owner of the machine. . . ."

---

[1] The Court here refers to Western Germany.

[2] This Article precludes the application of a foreign law where such application would "be contrary to good morals (*ordre public*) or the object of a German law".

[Report: *JZ*, 6 (1951), p. 444.]

Jurisdiction — Extra-territorial Effect of — Recognition of Foreign Legislation—Foreign Confiscatory Legislation—Claim by Employee of Company Confiscated in Foreign Country—Company Owning Property in Country of Forum—Whether Company Subject to Jurisdiction of *forum rei sitae* at Suit of Employee—The Law of Austria. **Case No. 45**

Re Erste Znaimer Brauerei und Malzfabrik AG.

Austria, Supreme Court. October 3, 1951.

The Facts.—From 1924 until 1945 the plaintiff (respondent herein) was an employee of the defendants, a limited company registered in Czechoslovakia. By virtue of a Czechoslovak Law enacted in 1945 the company was dissolved and its property confiscated, and the plaintiff, as a person of German origin, was dismissed from his employment and expelled from Czechoslovakia. The defendants owned land in Austria, and as according to Austrian law a person may be sued in the courts of the district in which real property owned by him is situate, the plaintiff brought an action against the defendants in the Austrian courts for payment of salary owing in respect of past services and the pension to which he was entitled by virtue of his contract of service with the defendants. On behalf of the latter it was conceded that confiscatory measures enacted in foreign States must, as a general rule, be refused recognition in Austria, but it was contended that this rule applied only in the case of shareholders who were the owners of the property of the company, but not in the case of employees who were entitled only to pursue personal claims against the company in the country of its registration. The defendants accordingly claimed that they were not subject to the jurisdiction of the Austrian courts at the suit of the plaintiff. On behalf of the plaintiff it was contended that he was entitled to sue the defendants in the Austrian courts within whose jurisdiction the defendants owned land, and that the distinction which the defendants purported to draw between the claims of shareholders and those of employees was misconceived.

Held: that the defendants were subject to the jurisdiction of the Austrian courts, and that the purported distinction between the claims of shareholders and those of employees was misconceived, the confiscation of the defendants' property in Czechoslovakia being of no effect in Austria for all purposes, and

Case No. 45 *Contd.*

not only for the purpose of preserving the rights of shareholders to property of the company situate in Austria. The Court said:

" The appellants [further] contend that the plaintiff ought to bring his action against the Czechoslovak State in the latter's capacity of owner of the defendants [*sic*]. It is not disputed that the defendants are a limited company and as such registered in the commercial register. They are therefore a legal entity and subject to being sued as such. In so far as concerns their liability to be sued, therefore, the question as to the person or persons who own the shares is quite irrelevant. The plaintiff was an employee of the defendants, and as such he can only sue his employers in respect of claims arising out of his contract of service, *viz.* he can only sue the defendants herein. The argument of the defendants that a judgment against them would not enable the plaintiff to obtain his money because the defendants' real property in Austria belongs to the expropriated shareholders can be successfully countered by the contention that this argument is directed only to the question of the local competence of the court and of execution, but has nothing to do with the defendants' liability to submit to the jurisdiction of the court. Moreover, this Court cannot share the view of the Court of Appeal that a judgment would only affect the Czechoslovak State and that the plaintiff would be unable to levy execution against property situate in Austria because such property remains unaffected by the confiscation. The plaintiff was a servant of the defendants and now claims the rights flowing from his contract of service. This claim is not directed against the owners of the defendants' shares, but against the defendants themselves who are the owners of real property situate in Austria. . . . There is no legal basis for the view of the Court of Appeal that the property of the defendants which is situate in Austria must be preserved for and distributed among the expropriated shareholders of the former company; Austrian law does not contain any provision to the effect that the claims of the shareholders have to be satisfied first and those of other creditors only thereafter. The claims of the plaintiff are derived from a contract of service concluded with the company before the latter was nationalised. There is therefore no reason why the plaintiff should not be entitled to satisfy his claim out of property belonging to his former employers when without the confiscation which has occurred in the present case, and which is not recognised in Austria, he would have been entitled to seek the satisfaction of his claim out of such property. As we have already pointed out, it is quite irrelevant who owns the shares, because the ownership of shares only confers members' rights and the right to participate in the proceeds of liquidation, but it does not confer any rights of property in the assets of the company. We need not concern ourselves with this question further because we are not called upon to decide whether by virtue of our judgment the plaintiff will be able to levy execution against the property of the defendants which is situate in Austria. All we have to decide is whether the defendants are subject to the jurisdiction of the Austrian courts. This question has to be answered in the affirmative for the reasons which we have given."

[Report: *SZ*, XXIV (1951), p. 597.]

Jurisdiction—Extra-territorial Effect of—Confiscation of Assets of Partnership—Debts of Partnership Incurred Prior to Confiscation of Assets—Effect of Confiscation in Foreign Country—Whether Partners Liable in Foreign Country for Debts of Partnership. **Case No. 46**

"DER GÜTERNAHVERKEHR" *v.* SEIDL.

Austria, Supreme Court. March 30, 1951.

THE FACTS.—During the Second World War the defendant was a partner in a firm of builders (hereinafter referred to as "the partnership") in Brünn, Czechoslovakia. The plaintiffs were at all material times haulage contractors carrying on business in Austria, and in 1943 and 1944 they did certain work for the partnership in respect of which a sum of money became due to them. This sum of money was still unpaid when the business of the partnership in Czechoslovakia was confiscated, and the plaintiffs now brought an action against the defendant (who, as a partner in the partnership, was personally liable for all debts of the latter) claiming payment of the amount still outstanding. On behalf of the plaintiffs it was contended that the confiscation of the business of the partnership in Czechoslovakia did not affect the debts of the partnership incurred prior to confiscation and that the defendant was therefore liable to pay the amount claimed. On behalf of the defendant it was contended that the confiscation of the business of the partnership in Czechoslovakia resulted in all liabilities of the partnership being extinguished, and that accordingly the defendant was not liable for the debts of the partnership.

Held: that the confiscation of the assets of the partnership in Czechoslovakia did not affect debts previously incurred, and that the defendant, as a former partner, was therefore liable. The Court said:

"The question—which has been put in the forefront of the appellant's [defendant's] argument—as to whether the confiscation of assets decreed in Brünn is to be recognised in Austria is immaterial for our decision. If the confiscation were

Case No. 46 Contd. not to be recognised, the position would be that the defendant would still have to be regarded as a partner of the partnership. In that case there could be no doubt that he would be liable. If, on the other hand, the legal reasoning were to be based on the fact of confiscation of the assets, the defendant would be liable as a partner who has left the partnership. We are not here in the least concerned with the question as to whether the foreign decree of confiscation is to be applied within the territory of Austria. This question could arise only if we were concerned with claims to assets of the partnership situate, or rights of the partnership existing, in Austria. In the present case only one question is decisive, and that is whether the defendant can be held liable for debts forming part of property which has been confiscated. In this context we have to consider that these debts were incurred when neither the partnership nor its partners were in any way subject to discrimination by reason of their nationality. By virtue of s. 128 of the Commercial Code the defendant, as a partner, was therefore personally liable for the debts of the partnership from the beginning. It cannot be said that the plaintiffs are acting *contra bonos mores* if they now avail themselves of their right, which was always open to them, to make the partner liable. Austrian law does not know of any rule of law which provides that a loss of assets results in previously existing liabilities being extinguished."

[Report : *SZ*, XXIV (1951), No. 89.]

Case No. 47 **Jurisdiction—Extra-territorial Effect of—Confiscatory Legislation—Expropriation of Partnership Business in Czechoslovakia—Partnership Claim against Debtor in Austria—Assignment of Claim to Assignee in Austria—Whether Assignee Entitled to Enforce Claim.**

LEDERER-PONZER *v.* RAUTENSTRAUCH.

Austria, Supreme Court. May 31, 1951.

THE FACTS.—The defendant, who carried on business in Vienna, bought goods from a partnership carrying on business in Czechoslovakia. The purchase price was still owing when the business of the partnership was confiscated by the Czechoslovak authorities in pursuance of a Czechoslovak Decree enacted in 1945. The partnership, some years later, assigned their claim against the defendant to the plaintiff in this action, who was domiciled in Austria. On behalf of the plaintiff it was contended that the confiscation of the assignors' business in Czechoslovakia did not affect the assignors' assets in Austria, and that as these assets included the claim against the defendant, the assignors had assigned to him, the plaintiff, a claim validly subsisting in Austria, and that he was accordingly entitled to recover the money originally owing to the assignors. On behalf of the defendant it was contended that the plaintiff had no *locus standi*, on the ground that the claim of the assignors against the defendant had been confiscated in Czechoslovakia, together with the assignors' business, and that the claim could not therefore be validly assigned to the plaintiff.

Held: that as the confiscation of the assignors' business in Czechoslovakia was limited in its effect to the assignors' assets in that country, it did not include the claim against the defendant ; that the claim had been validly assigned to the plaintiff ; and that the latter was therefore entitled to judgment. The Court said :

" The two lower courts were unanimous in holding that the firm of Josef Lederer (the assignors) in Czechoslovakia was confiscated without payment of compensation and that, at any rate in the present case, ' nationalisation ' as known to the law of Czechoslovakia constituted a confiscation without payment of compensation. They both arrived at the legal conclusion that a confiscation of this kind affects only the assets situate in the confiscating State and is effective only in the territory of the latter, but not in the territory in which Austrian law applies ; that, on the contrary, according to the principles of private international law and ' *ordre public* ' it is not recognised in Austria. . . . Confiscations without payment of compensation are refused recognition in Austria as being measures of war. This rule must be applied by analogy in all other cases where measures of persecution have been taken against a specified group of persons, whether by reason of their belonging to a national or a religious minority. Once it has been found that the firm of Josef Lederer & Co. has been ' nationalised ',—and this equivocal term must be understood as being a confiscation without payment of compensation within the sphere of Czechoslovak law—it follows that the ' nationalisation ' is incapable of having any legal effect within the sphere of Austrian law. Having regard to the fact that the transfer to the Czechoslovak State of the assets of the firm which are situate in Austria is not recognised in Austria, these assets vest *ipso jure* in the former partners upon the dissolution of the partnership. As the partners have assigned their shares in this claim to the plaintiff, the latter is now exclusively entitled to it because the assignment as such is not contested. The lower courts were therefore right in affirming the *locus standi* of the plaintiff."

[Report : *SZ*, XXIV (1951), No. 156.[1]]

---

[1] In *Re Ungarische Tuchfabrik AG* the District Court of Vienna (*Landesgericht*), in a judgment dated March 3, 1951, ordered the appointment of a

Jurisdiction—In General—Territorial—Expropriation of Alien Property—Seizure of Bearer Bonds Outside of Country by Vesting Order Directed to Obligor and Indenture Trustee Within Country.

See Case No. 159 (*Cities Service Company* v. *McGrath*).

ii.—Criminal Jurisdiction over Foreigners

Case No. 48 **Jurisdiction—Criminal Jurisdiction over Aliens—Crimes Committed Abroad—Currency Offences.**

Public Prosecutor *v.* L.

Holland, Supreme Court. November 13, 1951.

The Facts.—The defendant, a woman of Belgian nationality and domiciled in Belgium, was prosecuted in the Special Police Court of Breda on November 2, 1950, for having acted in Belgium as an accessory to offences committed by Netherlands subjects against the Dutch Currency Decree (*Deviezenbesluit*) of October 10, 1945 (*Staatsblad*, No. F 222), by giving them an opportunity and means to commit the said offences. Under Article 31 (5) of the Decree the acts therein defined as offences were made punishable if committed in a foreign country. The defendant's contention that she was not subject to Dutch criminal law was not accepted, and she was convicted. The conviction was upheld by the Court of Appeal at 's'Hertogenbosch on March 7, 1951.

The defendant appealed further.

Held (by the Supreme Court): that the accused was rightly convicted. The acts committed by the accused did not come under any of the general principles of applicability of Netherlands criminal law as laid down in Book 1, Section 1, of the Netherlands Penal Code. These acts could therefore only fall under the scope of Dutch criminal law in virtue of the special provisions contained in Article 31 of the Emergency Decree of 1945 on Currency Restrictions. Those provisions were directed not only against Netherlands subjects who committed currency

---

" curator " to administer the assets in Austria of a company which, prior to the confiscation of its assets by the Hungarian authorities, had been registered in Hungary. The appointment of the curator was made on the application of shareholders of the company. The Court held that the confiscation carried out in Hungary did not affect the assets of the company in Austria and that the shareholders were entitled to share *pro rata* in the proceeds of liquidation of the company's Austrian assets, and that a curator should be appointed to carry out the liquidation of these assets: *Journal du Droit international*, 1953, p. 164.

offences in a foreign country, but also to foreign nationals abroad who were accessories to such offences.

[Report: *N.J.*, 1952, No. 42.]

Jurisdiction—Criminal Offences Committed Abroad—Offences by Foreigners—Subsequent Migration to and Acquisition of Nationality of Country Exercising Jurisdiction—The Law of India. **Case No. 49**

RAM NARAIN *v.* THE CENTRAL BANK OF INDIA LTD.

India, High Court, Punjab (*Revisional Criminal*).
(Falshaw J.)
November 28, 1951.

THE FACTS.—Ram Narain was a resident and a native of Multan District, which, since August 15, 1947, has formed part of Pakistan. Prior to the Partition of India and the coming into existence of Pakistan, Ram Narain had had dealings with the Central Bank of India whereby he had borrowed a sum of money from them and had pledged in security for this loan 802 bales of cotton. After the Partition of India, on November 6, 1947, Ram Narain had broken into the godown (which is a kind of warehouse or store-house) where these bales were stored and had removed them. Later in November 1947, Ram Narain left Pakistan and came to Bombay and ultimately settled in Hodal in the district of Gurgaon in India. The Bank learnt of the alleged theft of the bales of cotton and in February 1950 applied to the Punjab (India) Government for his prosecution in the Punjab. Sanction was accorded on February 12, 1950, for the prosecution of Ram Narain in India. The case against him was instituted by a complaint in April 1950, in the Court of the District Magistrate at Gurgaon, where at the outset Ram Narain intimated his intention of challenging the jurisdiction of the Court on the ground that the offence was committed in Pakistan and that at the time of the offence he was not a national of India.

The prosecution contended that, at the material times, Ram Narain was a national of India, and that he was liable to prosecution in India for the offence he had committed in territory which had become part of Pakistan. On May 8, 1951, the District Magistrate, Gurgaon, made an order holding that his Court had jurisdiction to try Ram Narain and directing that the case should be proceeded with in the normal course. An Order of the Additional Sessions Judge, at Gurgaon, dated August 2, 1951, affirmed the order of the Magistrate, and from this order the petitioner petitioned the High Court for a

Case No. 49 Contd.

revision, claiming that he was not amenable to the jurisdiction of the Indian Courts in this matter.

Held: that, by Indian Law, Indian Courts had no jurisdiction over foreign subjects for acts done abroad, and, consequently, the revision petition must be accepted and the charges laid against Ram Narain set aside. Since, until the petitioner actually left Pakistan and came to India, he could not possibly be said to have become a national, or citizen, of India, it followed that the Indian courts had no jurisdiction over the offence alleged against the petitioner. Section 188 of the Indian Criminal Procedure Code was the only provision of law under which anybody could be tried in a court in India for an offence wholly committed and completed outside India. Nevertheless, that section applied only to offences committed by Indian nationals and in a foreign territory over which the Government of India exercised control so that the sovereign thereof was excluded from trying the Indian subject concerned.

Falshaw J. said: ". . . Prima facie it would appear that since the two separate dominions were created by the Indian Independence Act, 1947, as from the 15th of August of that year, and the whole of the offences committed by the accused were completed at Mailsi, the case arising out of the offences would ordinarily be triable only in the district of Multan. On behalf of the bank, however, reliance is placed on the provisions of section 4 of the Indian Penal Code and section 188 of the Criminal Code, both as they stood in 1947 and as since amended. The relevant portion of section 4 of the Penal Code before amendment read—

> 'The provisions of this Code apply also to any offence committed by:
>
> (1) any native Indian subject of Her Majesty in any place without and beyond British India.'

Since 1950 the wording is:

> '(1) Any citizen of India in any place without and beyond India.'

Section 188, Criminal Procedure Code, formerly read—

> 'When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India . . . he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found.'

The present wording is—

> 'When a British subject domiciled in India commits an offence at any place without and beyond all the limits of the Provinces . . .

he may be dealt with in respect of such offence as if it had been committed at any place within the Provinces at which he may be found.'

" There does not seem to be any doubt on the evidence produced that Ram Narain never intended to remain in Pakistan. . . . There equally does not seem to be any doubt that since the Constitution came into force he has become a citizen of India under article 6 (*b*)(i) of the Constitution. The question is, however, what was his status before he came to India in the later part of November 1947 and still remained in the Multan District of the West Punjab where he and his ancestors had lived. The Courts below have taken the view that in no sense of the word did he acquire any Pakistan nationality, and that he remained at the material period a ' Native Indian subject of Her Majesty'. . . .

" In my opinion it is quite clear that until he actually left Pakistan and came to India he cannot possibly be said to have become a national or a citizen of India. . . .

" In deciding the question in issue it is necessary to examine the scope and objects of section 188, Criminal Procedure Code. . . . To my mind the object of the section is made clear by the two provisos, which read—

' Provided that notwithstanding anything in any of the preceding sections of this Chapter no charge as to any such offence shall be enquired into in British India (the Provinces since the amendment of 1948) unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that in his opinion, the charge ought to be inquired into in British India (the Provinces) ; and, where there is no Political Agent, the sanction of the Local Government (Provincial Government) shall be required :

' Provided also, that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence had been committed in British India (the Provinces) shall be a bar to further proceedings against him under the Indian Extradition Act, 1903, in respect of the same offence in any territory beyond the limits of British India (the Provinces).'

" Although both according to the old and the new wording of the earlier parts of the section it could possibly be read as applying to offences committed in foreign countries, when the section is read as a whole, it seems to me clearly, except for the portion referring to offences committed in Indian ships or aircraft, to have been intended only to be applied to offences committed in those parts of India which were included in the States as opposed to British India, and the object was to prevent anybody who had been tried in British India for an offence committed in a State from being tried again in that State for

Case No. 49 Contd. the same offence. . . . Now if the offence is committed in a foreign country over which the Government of India has no control, it is quite clear that the second proviso could have no effect, since it would not be at all binding on the foreign Government which could still prosecute the offender for the offence committed within its territory . . . and ignore the proceedings in the Court in India. . . ."

[Report : *I.L.R.* [1952], V, Punjab 326.]

Jurisdiction—Criminal Jurisdiction over Foreigners—Offences by One Member of a Foreign Occupying Army against Another.

See Case No. 165 (*In re Verhulsdonck*).

Jurisdiction—Jurisdiction over Subjects' Property Situated Abroad—Exterritorial Effect of Confiscatory Decrees.

See Case No. 11 (*Novello & Co., Ld.* v. *Hinrichsen Edition Ld.*).

viii.—Exemptions from and Restrictions upon Territorial Jurisdiction

(a) FOREIGN STATES

[See also Part II, A, II, *Sovereignty and Independence* : iii, *Conduct of Foreign Relations. Conclusiveness of Statements of the Executive.*]

Case No. 50 **Jurisdiction—Immunity from—Foreign States—Pakistan Federation—Contract Expressly Submitting to Jurisdiction—Immunity in relation to Commercial Contract.**

KAHAN *v.* PAKISTAN FEDERATION.

England, Court of Appeal.
(Jenkins and Birkett L.JJ.)
July 24, 1951.

THE FACTS.—The plaintiff, Kahan, had entered into a contract with the Pakistan Government to sell them a quantity of Sherman tanks. He now sued for damages for alleged breach of contract.

Clause 19 of the contract read :

" The interpretation and effect of this agreement shall be construed and governed by English law and for the purpose of proceedings this agreement shall be deemed to have been made in England and to have been performed there. The Government agrees to submit for the purposes of this agreement to the jurisdiction of the English courts. Any legal proceedings and any notices under this agreement requiring to be served on the vendor or on the Government respectively shall be deemed to be properly served, if served on the vendor at the address given at the heading of this agreement or on the High Commissioner for Pakistan in the United Kingdom at 35 Lowndes Square, London, S.W.1. . . ."

The agreement was signed by the High Commissioner for Pakistan, purporting to do so by order and direction of the Government of Pakistan.

The Pakistan Government entered a conditional appearance to this writ and issued a summons to set it aside so far as it purported to implead the Pakistan Government.

The Master made an order which, after providing for an alteration of the description of the first defendant from " The Government of Pakistan " to " The Federation of Pakistan ", set the writ aside in so far as it purported to implead the Federation of Pakistan.

On appeal to him in chambers, Slade J. sought the advice of the Secretary of State for Commonwealth Relations, and had the following reply of April 3, 1951 :

" With reference to your letter of 9th March, stating that for the purpose of an interlocutory application in the above action Mr. Justice Slade desires to have a certificate indicating whether Pakistan is an independent Sovereign State, I am directed by the Secretary of State for Commonwealth Relations to inform you that an independent Dominion of Pakistan was set up by section 1 of the Indian Independence Act, 1947. Under the subsequent provisions of that Act, in particular, sections 5, 6 and 7, and by reason of the Constitutional Conventions, which govern the practice in these matters, Pakistan is a self-governing country within the British Commonwealth of Nations, Sovereign both in internal and in external affairs, linked with the United Kingdom, through a common allegiance to the Crown, but in other respects independent of it. In the view of the Secretary of State, therefore, Pakistan is an independent sovereign State."

Slade J. thereupon dismissed the appeal. The plaintiff appealed. It was agreed between counsel that, although special considerations might apply to the case of a member of the British Commonwealth, Pakistan should be treated for the purposes of this appeal as a foreign sovereign State.

For the plaintiff it was argued, *inter alia*, that there was no generally accepted principle of international law that an independent sovereign State was immune from jurisdiction in respect of commercial transactions and that the force of law should not be given to any doctrine of international law unless

Case No. 50 *Contd.* it had the hall-mark of general consent and reciprocity. The doctrine of immunity was a concession to the dignity, equality and independence of sovereign States and should be jealously guarded. It should not be extended having regard to the growth of State trading which was a comparatively modern development. There was no challenge to the dignity, equality or independence of a sovereign State in being sued in the courts of another State in respect of commercial contracts. In this particular case it would be inconsistent with such dignity, equality and independence for the doctrine to apply. There could not be any suggestion of challenge to the independence of Pakistan by doing that which that sovereign State had, in advance, agreed should be done, in the circumstances contemplated by the parties.

Held: that the appeal must be dismissed. Assuming Pakistan to be in the same position as a foreign sovereign State, she was entitled to plead immunity from suit and to resile from her undertaking in clause 19 of the contract. Nothing short of actual submission to the jurisdiction made in the face of the court would suffice to establish jurisdiction.

Jenkins L.J. said :

" Two questions arose for decision before the master and the judge in chambers. The first concerned the status of the Federation of Pakistan, and as to that, the matter was, I understand, put in two ways before the master. First, it was said that the Federation of Pakistan, though within the British Commonwealth, had the status of an independent sovereign State and thus was in the same position for the purposes of suit in this country as any foreign sovereign would be. Alternatively, it was said that if the Federation of Pakistan was not in that sense an independent sovereign State, the action must then be regarded as an action against the Crown in its capacity as sovereign of Pakistan, and it was claimed that in that alternative also the plaintiff's action would not lie, because the Crown Proceedings Act, 1947, which enables the Crown to be sued by writ, would not apply to the Crown in its capacity as sovereign of Pakistan.

" When the matter came before us, Mr. Lindner, for the plaintiff, began by accepting the view that the certificate was conclusive and that, in order to succeed, he must bring his case within some exception to the general rule as to the immunity of independent sovereign States from suit in this country. Mr. Diplock, for the Pakistan Government, then intervened and intimated that for his part he wished to keep open that question. He said that special considerations might apply to the case of a member of the British Commonwealth of Nations whose rights stemmed from an Act of the Imperial Parliament differing from those which applied in the ordinary case of a foreign sovereign State in the strict sense of the expression. Thereupon, Mr. Lindner made certain formal submissions on that matter, but he did not press the argument, as indeed he foresaw that his position would not be improved by successfully pursuing it. No convincing reasons were adduced before us why such a certificate should not be just as conclusive in the present case as it would be in the case of a foreign sovereign State ; but the matter was not fully argued and it is not necessary for the purposes of the present appeal to express any concluded opinion upon it, for ultimately both parties agreed that for the purposes of this appeal the Federation of Pakistan could be taken to be in the position of a foreign sovereign State so far as the question of immunity is concerned. Mr. Diplock, however, reserved the right, should this matter fall to be dealt with elsewhere, to make the alternative submission he had adumbrated as to the status of the Federation of Pakistan. That disposes of the first question.

" The second question is this : the status of the Federation of Pakistan being for this purpose, *ex concessis*, equivalent to that of a foreign sovereign State, is that Government, in the circumstances of this case, amenable to the proceedings brought against it ; that is to say, are the present proceedings properly brought against the Federation of Pakistan, being for this purpose equivalent to a foreign sovereign State ?

" The general rule is well settled, and it is unnecessary for me to do more than refer to the statement of it given in the speech of Lord Atkin in the case of *Compañía Naviera Vascongado* v. *S.S. Cristina* ([1938] A.C. 485, 490), where he said : ' The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both.'

" Prima facie, the present case comes within the first of those two propositions. This is a plain case of bringing an action against an independent sovereign State and thereby directly impleading that sovereign. Prima facie, therefore,

Case No. 50 *Contd.* it is an action which, *quoad* the sovereign concerned, the courts of this country have no jurisdiction to entertain, and it is therefore a case in which the writ was rightly set aside as against the sovereign thus sought to be impleaded.

" Mr. Lindner claims that the present case comes outside that general rule. To appreciate his argument, it is necessary to look at cl. 19 of the contract sued upon. [His Lordship read cl. 19 in full.]

" Mr. Lindner uses cl. 19 in two ways. First, he uses it in support of an argument of this nature : this is a case in which a foreign sovereign has chosen to come to this country and enter into an ordinary commercial agreement with a clause in the terms of cl. 19, showing that it is to be regarded in no different light from a contract between ordinary individuals for similar purposes. He invites us to hold that a transaction of that kind is, on general principles, outside the ordinary doctrine of immunity. That is an argument which, with all respect to Mr. Lindner, I find it quite impossible to accept. As I have already mentioned, this is a plain case of direct impleading coming within the first of the two propositions stated by Lord Atkin in *The Cristina* case. So far as Lord Atkin's second proposition is concerned, embracing as it does cases of proceedings affecting the property as distinct from the person of a sovereign and cases in which, while there is no direct impleading of the sovereign, it may be said that he has been indirectly impleaded in that his title to or possession of property is placed in jeopardy, it is no doubt true that there are various judicial pronouncements expressing doubt as to the precise limits which should be placed upon it, but, so far as I know, no qualification of the first proposition has ever been suggested. A foreign sovereign cannot be directly impleaded unless he submits to the jurisdiction of the court.

" There remains the second branch of Mr. Lindner's argument, which is to the effect that cl. 19 of the contract is, for the purpose, a submission to the jurisdiction of the court which precluded the Federation of Pakistan from thereafter objecting to the jurisdiction in any proceeding which might ensue upon the contract. There is no doubt that cl. 19 does contain an express and unambiguous agreement on the part of the Government—that is the Federation—of Pakistan to submit, for the purposes of the agreement, to the jurisdiction of the English courts. Regarding the matter as if it were free from authority, there is therefore a considerable attraction in Mr. Lindner's argument, for it may be said with force : What reason is there why a party to an agreement, whether a foreign Government or any other person not ordinarily amenable to the jurisdiction of the English courts, should, after solemnly and expressly agreeing to submit to the jurisdiction of those courts for the purposes of a particular agreement, be allowed to resile from that bargain made in perfectly clear terms? But the matter is not free from authority, and I think it is established beyond question by authorities binding on this court that a mere agreement by a foreign sovereign to submit to the jurisdiction of the courts of this country is wholly ineffective if the foreign sovereign chooses to resile from it. Nothing short of an actual submission to the jurisdiction—a submission, as it has been termed, in the face of the court—will suffice.

" The authorities which establish that proposition, so far as I need refer to them, are two. The first is the case of *Mighell* v. *Sultan of Johore* ([1894] 1 Q.B. 149). The facts of the case were very different from those in the present case. It was a case of a foreign sovereign residing in this country under an assumed name as if he was a private individual, and it was argued that, by so conducting himself, he had inferentially submitted to the jurisdiction of the English courts for the purposes of the contract sued upon. It was held that he had not done so on the facts of the case, but in so holding the members of the court made certain observations which are most relevant here.

" ' Lord Esher, M.R., said: " We had not then to deal with the question of a foreign sovereign submitting to the jurisdiction; everybody knows and understands that a foreign sovereign may do that. But the question is, how? What is the time at which he can be said to elect whether he will submit to the jurisdiction? Obviously, as it appears to me, it is when the court is about or is being asked to exercise jurisdiction over him, and not any previous time. Although up to that time he has perfectly concealed the fact that he is a sovereign, and has acted as a private individual, yet it is only when the time comes that the court is asked to exercise jurisdiction over him that he can elect whether he will submit to the jurisdiction. If it is then shown that he is an independent sovereign, and does not submit to the jurisdiction, the court has no jurisdiction over him. It follows from this that there can be no inquiry by the court into his conduct prior to that date."

" ' Lopes L.J. said: " But there is no doubt that a foreign sovereign may submit to the jurisdiction of the courts of this country, and it was contended that in this particular case he had so submitted, because he had taken an assumed name and acted as a private individual. We are asked from that to infer the fact of submission to the jurisdiction. I am of opinion that no such inference can be drawn. In my judgment, the only mode in which a sovereign can submit to the jurisdiction is by a submission in the face of the court, as, for example, by appearance to a writ," and Kay L.J. said: " I should put it thus: the foreign sovereign is entitled to immunity from civil proceedings in the courts of any other country, unless, upon being sued, he actively elects to waive his privilege and to submit to the

Case No. 50 *Contd.*

jurisdiction. Here the defendant has not done that, but just the contrary." '

" Mr. Lindner argued with force that, though the observations I have quoted are at first sight against him, no great weight should be attached to them, because the circumstances of the case there under consideration were so entirely different from those in the present case. In *Mighell* v. *Sultan of Johore* the court was concerned with an argument that submission was to be inferred from the fact that the foreign sovereign had chosen to live here under an assumed name as a private individual, whereas the submission here relied on is an express formal submission in clear terms contained in a contract. There is great force, to my mind, in those observations ; but the matter does not rest there, for it was later considered by the House of Lords in the well-known case of *Duff Development Co. Ld.* v. *Government of Kelantan* ([1924] A.C. 797). That was the case in which there was a contract with the Government of Kelantan containing an arbitration clause incorporating the Arbitration Act, 1889, so far as applicable. Disputes having arisen under the deed, they were referred to an arbitrator, who made an award in favour of the company and directed the Government of Kelantan to pay the costs. The Government later applied to the Chancery Division, under s. 11 of the Arbitration Act, to set aside the award, but the application was refused. Thereafter, the company obtained from the King's Bench Division, under s. 12 of the Act, an order giving leave to enforce the award, but this order was set aside, on the application of the Government, on the ground that Kelantan was an independent sovereign State.

" The question was thus raised in an acute form whether the Government of Kelantan had or had not submitted to the jurisdiction of the court."

His Lordship then quoted extensively from the speeches of Lords Cave, Dunedin and Sumner in that case. He then continued :

" It will thus be seen that three out of five learned Lords who heard *Duff Development Co. Ld.* v. *Government of Kelantan* expressed, in the clearest possible terms, the view that no mere agreement *inter partes* to the effect that a foreign sovereign should submit to the jurisdiction of the court can suffice to give the court jurisdiction, in the event of the foreign sovereign choosing to resile from it. Actual submission before the court itself, and nothing short of that, is required. It follows that, on the basis on which we have been asked to deal with this appeal, namely, on the basis that the Federation of Pakistan is to be regarded for this purpose as equivalent to a foreign sovereign State enjoying the recognized immunities accorded to such a State, I am of opinion that the appeal must fail. The action involved a direct impleading of a foreign sovereign, and there was no submission to the jurisdiction, because it is plain on the authorities that a mere agreement by a foreign sovereign, such as that contained in cl. 19 of the contract here sued upon, to submit to the jurisdiction of the English courts, does not suffice to give those courts jurisdiction."

His Lordship then dealt briefly with the mode of serving the writ, then concluded :

" For these reasons, I am of opinion that in this case, which turns entirely upon the authorities, and in which we have not been concerned at all with the merits, one way or the other, of the dispute sought to be litigated, the master and the judge came to a right conclusion, and accordingly that the appeal should be dismissed."

Birkett L.J. said : " I agree with the judgment just delivered. Although there is strictly nothing that I need add, I should like to say a word or two about the principal point which seems to me to govern the decision. I would like to re-emphasize what my Lord has said, namely, that we have not been concerned in the smallest degree with the merits of this matter. There were times when Mr. Lindner seemed to me to be getting a little impassioned. It is right, therefore, that I should say that we have not been informed and we have not considered and we do not discuss any merits on the one side or the other. The case is, I think, as my Lord has said, purely to be decided as a matter of law, and in the result the case of *Duff Development Co. Ld.* v. *Government of Kelantan* ([1924] A.C. 797) is conclusive of almost every point. [His Lordship cited passages from that decision and continued :]

" I also agree that the procedure in this case falls within the first proposition of international law engrafted into our domestic law laid down by Lord Atkin in *The Cristina* ([1938] A.C. 485, 490) : ' The courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages'.

" But I confess that I was exercised about the argument put forward by Mr. Lindner about cl. 19, because, if the language of cl. 19 is looked at, nothing could really be plainer. It says : ' The Government agrees to submit for the purposes of this agreement to the jurisdiction of the English courts ', and then it goes on to deal with procedural matters, but nothing, of course, could be plainer than that, in this contract between the plaintiff and the Federation of Pakistan, it was a term of the agreement that the Government would submit, for the purposes of this agreement, to the jurisdiction of the English courts. No doubt, when the contract was being prepared, that aspect of the matter received, as it deserved to have received, the most careful consideration : ' Should there be a

Case No. 50 *Contd.*

breach of contract, or a dispute, what are we to do ? ' Clause 19 appears to give the answer : ' The Government will submit to the jurisdiction '. There is, indeed, immense force in what Mr. Lindner has said, to use his words, that this was an agreement for valuable consideration agreeing to the jurisdiction : it is binding and it is a waiver.

" It is important to remember that *Mighell* v. *Sultan of Johore* ([1894] 1 Q.B. 149) and *Duff Development Co. Ld.* v. *Government of Kelantan* concern this very matter, and of these perhaps the second is the more impressive. It is quite frankly stated in *Mighell* v. *Sultan of Johore* that that case was brought by way of appeal against the proposition that the certificate of a Secretary of State should be binding ; but it is a very odd case in some respects, because, there, the only matter that was alleged was that this foreign potentate had come to this country in 1885 and, according to the affidavit of the plaintiff, had lived under the name of Albert Baker and had promised the plaintiff, as alleged, marriage in the name of Albert Baker. Then, the plaintiff having discovered that he was really the Sultan of Johore, she promised to keep the matter secret. Then he left this country and came back in 1893, still under the name of Albert Baker, and what was said in that case was : ' That was your waiver of your immunity. That was your implicit submission to the jurisdiction ' ; but whether those facts ever could or did amount to any such thing became really immaterial, because, as Lord Esher, M.R., having dealt with *The Parlement Belge* (4 P.D. 129 ; 5 P.D. 197), said : ' We had not then to deal with the question of a foreign sovereign submitting to the jurisdiction ; everybody knows and understands that a foreign sovereign may do that. But the question is, How ? What is the time at which he can be said to elect whether he will submit to the jurisdiction ? Obviously, as it appears to me, it is when the court is about or is being asked to exercise jurisdiction over him, and not any previous time.'

" My Lord has already quoted the passage from the judgment of Lopes L.J., and that from the judgment of Kay L.J. So, on the facts of that case, which are very dissimilar, of course, from the facts here, nevertheless a principle of law was enunciated as to the manner in which an effective submission to the jurisdiction can be made. But *Duff Development Co. Ld.* v. *Government of Kelantan* in the House of Lords seems to me to be an overwhelming authority against the submission of Mr. Lindner, because the very words used by the Law Lords apply with absolute strictness to this case. Take this passage in the speech of Viscount Cave (*ibid.*, 810) : ' If therefore a sovereign having agreed to submit to jurisdiction ' (that is this case, according to Mr. Lindner ; cl. 19 says in the plainest terms, ' I submit to the jurisdiction ') ' refuses to do so when the question arises ' (that is exactly this case) ' he may indeed be guilty of a breach of his agreement, but he does not thereby give actual jurisdiction to the court '. The words might have been framed for this very case.

" Similarly, the words of Lord Dunedin (*ibid.*, 821) : ' True it is that the Sultan contracted to allow the jurisdiction to be exercised against him ' (that is this case) ' but he did so out of court ' (this case) ' and now has changed his mind ' (this case). ' He has broken his contract, but the court has no jurisdiction to enforce any performance of it.' Then there was the other confirming passage in the speech of Lord Sumner which, as I say, might have been prepared with the facts of this case in mind.

" For these reasons and the reasons adduced by my Lord, with which I fully agree, I think that notwithstanding the terms of cl. 19, by which the Government of Pakistan wrote : ' We agree to submit for the purposes of this agreement to the jurisdiction of the English courts ', yet on the authority of *Mighell* v. *Sultan of Johore*, decided in the Court of Appeal, and still more so of *Duff Development Co. Ld.* v. *Government of Kelantan*, decided in the House of Lords, which comes so near to that case, the submissions of Mr. Lindner must fail, and this appeal must be dismissed."

[Report : L.R. [1951] 2 K.B. 1003.]

Jurisdiction—Exemption from—Foreign States—Sovereign Immunity—Private Party Demanding Funds in Hands of Other Private Parties in Redress for Acts of a Foreign Government—Indirectly Impleading a Foreign Government—Set-Off. **Case No. 51**

ANDERSON *v.* SPEYER.

United States, Supreme Court, Special Term, New York County.
June 5, 1952.

THE FACTS.—Anderson and others, individually and as members of the International Committee of Bankers of Mexico (1922), brought a voluntary accounting action against Speyer and others, seeking approval of their activities and accounts and for certain appropriate incidental relief in order to accomplish a final plan of distribution of all of the funds in the hands of the Committee. Before the Court was a motion to dismiss counterclaims by certain of the defendants, which latter, in effect, sought redress for an alleged wrong done to them by the Mexican Government in terminating the right of bondholders to assent to refinancing agreements. The details of the latter allegation are set forth in the *Held* below.

Held: that the motion to dismiss the counterclaims must be granted. The Court said :

Case No. 51 *Contd.*

" The gist of the alleged second counterclaim is the claim of the non-assenting bondholders that the decree of the Mexican government terminating the period during which bondholders were permitted to assent to the Mexican government Refinancing Plans deprived these defendants and other non-assenting bondholders of certain rights accorded to the assenting bondholders under the Plans. The counterclaiming defendants accordingly demand that this court, in the present action, direct that the funds remaining in the hands of the committee be distributed first to the non-assenting bondholders in order to equalize the payments made by the Mexican government to the assenting bondholders under the 1942 and 1946 agreements.

" It thus appears clearly that what is sought by these counterclaims is an adjudication that the Refinancing Agreements, and in particular the Mexican decree terminating the right to assent, are confiscatory and of no legal effect so far as the non-assenting bondholders are concerned.

" The counterclaims do not allege that any act of the assenting bondholders is the basis of the claim now put forth by the non-assenting bondholders. The funds in the hands of the plaintiffs have already been adjudicated as belonging to the bondholders, *Lamont* v. *Travelers Ins. Co.*, Sup., 66 N.Y.S. 2d 307, affirmed 272 App.Div. 337, 71 N.Y.S. 2d 219, affirmed 297 N.Y. 797, 77 N.E. 2d 801. Any rights which the Mexican government may assert to the monies in the possession of the plaintiffs must be based upon the alleged assignments by the assenting bondholders. Stripped of all superfluous verbiage as well as inconsequential and conclusory language, the alleged second counterclaims seek to recover for non-assenting bondholders, from the monies in the possession of the plaintiffs, amounts equal to the sums already paid by the Mexican government to assenting bondholders under the 1942 and 1946 agreements. The counterclaims set forth in detail the defendants' complaint and criticism of the Mexican registration decrees and assert that these defendants and others in the same class have been prejudiced by reason of the closing of registration before they were able to assent under the said agreements. It is further alleged substantially that these defendants lost the benefits acquired by the assenting bondholders and that Mexico has been enriched unjustly by the closing of registration. These defendants accordingly demand that in the next distribution, to be made in this action, the claims of the non-assenting bondholders be given priority to those of the assenting bondholders. In reality this does not constitute a claim against the assenting bondholders but is rather a claim of the non-assenting bondholders for compensation by reason of the alleged confiscatory decrees of the Mexican government. If any cause of action is alleged it is one which must find its foundation in the acts of the sovereignty of

Mexico, a foreign government which may not be called to account without its consent in this court.

" Our courts have no jurisdiction over foreign powers, *Leavitt* v. *Dabney*, 37 How.Prac. 264 ; *Kingdom of Roumania* v. *Guaranty Trust Co. of New York*, 2 Cir., 250 F. 341 ; *Lamont* v. *Travelers Ins. Co., supra.* A friendly sovereign government cannot be sued nor its property attached in our courts without its consent. Even where the foreign government comes in to our courts as a suitor, the defendant may not avail himself of any counterclaim or set-off except, perhaps, a set-off arising out of the same transaction, *Kingdom of Roumania* v. *Guaranty Trust Co. of New York, supra.*

" The situation now presented is unlike that in the case of *Lamont* v. *Travelers Ins. Co.*, 281 N.Y. 362, 24 N.E. 2d 81, 83, in which it was pointed out that ' neither the plaintiffs nor the defendant Ottenheimer seek any relief against the Government of Mexico or redress for a wrong which they claim the Mexican Government has done '. The present defendants by their counterclaims are seeking ' redress for a wrong which they claim the Mexican government has done '. The defendants are demanding the funds in the hands of the Committee by reason of alleged tortious acts committed by the government of Mexico. ' Redress for repudiation even of a solemn contract or for injury inflicted without any justification by a sovereign State cannot be granted by the courts without the consent of the sovereign State ', *Lamont* v. *Travelers Ins. Co.*, 281 N.Y. 362, 369, 24 N.E. 2d 81, 84, *supra.* The defendants, by their alleged second counterclaims, are seeking redress for such an injury. The picture would be different if these defendants, as they have in their alleged first counterclaims, to which no objection is made, were claiming their share as bondholders in the distribution of the funds in the possession of the plaintiffs, along with all other bondholders. By the counterclaims under attack, the defendants seek an adjudication of this court repudiating the agreements and decrees of the Mexican government."

[Report : 115 N.Y.S. 2d 132.]

Jurisdiction—Exemption of Foreign States from Territorial Jurisdiction—Foreign State as Owner of Immovable Property within Jurisdiction—Action *in rem*—Whether Foreign State Entitled to Claim Exemption. **Case No. 52**

RESTITUTION OF PROPERTY (REPUBLIC OF ITALY) CASE.

German Federal Republic, Court of Appeal of Hamm.
April 14, 1951.

THE FACTS.—A law enacted in Germany after the end of hostilities in the Second World War provided, as far as here

Case No. 52 *Contd.*

material, that the former owners of identifiable property who had sold such property between the years 1933 and 1945 because certain discriminatory legislation enacted in Germany was such as to make their continued ownership of property in that country virtually impossible, were entitled to claim the return thereof from those who had acquired it during that period. Between 1933 and 1945 the Government of Italy, respondents herein, had purchased certain real property from a person who was subject to the discriminatory legislation here referred to, and that person, the appellant herein, accordingly brought an action against the Republic of Italy claiming the return of his property. On behalf of the Republic of Italy it was contended that as a sovereign State it was not subject to the jurisdiction of the German courts. This contention was upheld by the lower Court, and the appellant now appealed.

Held: that this was an action *in rem* concerning real property situate in Germany, and that the general rule which conferred upon foreign States exemption from the jurisdiction of the German courts did not apply; that the Republic of Italy, as the owner of such property, was accordingly subject to the jurisdiction of the German courts, and that the case must be sent back to the lower Court in order there to be determined on the merits. The Court said:

" We agree with the general remarks of the lower Court concerning the exercise of jurisdiction over foreign States. Private international law recognises the rule, which admits of exceptions, that according to international law a State may not be brought before the courts of another State. Private international law has increasingly admitted exceptions to this rule, namely, in cases in which a foreign State enters into private contractual relations with other States or with nationals of the latter and no longer exercises its activities as the holder of sovereign rights, but in the field of purely private and commercial intercourse. The Supreme Court of the Reich (Reichsgericht) has held that the rule of exterritoriality—as is almost universally recognised—is subject to certain limitations where actions *in rem* are concerned, the reason being that the soil is regarded as an inseparable part of the territory of the State and therefore subject only to the sovereignty of the State to which it belongs. The Supreme Court of the Reich subsequently confirmed this view and pointed out that according to German law actions concerning the ownership and hypothecation of immovable property are subject to the exclusive jurisdiction of the *forum rei sitae* and that such jurisdiction is not affected by the rules governing exterritoriality, on the ground that a foreign State acquiring immovable property in Germany must be taken to have appreciated this factual and legal situation beforehand.

"This view, as expressed by the Supreme Court, implies a considerable limitation of the rule that a State is not subject to the jurisdiction of another. International jurisprudence has gone even further and has increasingly recognised an exception to the (general) rule of international law in all cases in which a foreign State exercises activities, not as the holder of sovereign rights, but in the field of private law. . . . There are no generally recognised rules of international law to the effect that a foreign State is wholly exempt from territorial jurisdiction. There is therefore no reason not to apply to claims for the restitution of property the principles which have been laid down by the Supreme Court and approved by foreign countries, and which coincide with those accepted in Italy. We cannot share the view of the lower Court that these principles are inapplicable by reason of the fact that the action does not arise from a contract between the parties, but from a law subsequently enacted to which the Republic of Italy could hardly be held to have subjected itself. Firstly, the notional acceptance by a State of the jurisdiction of another State is immaterial, the relevant factor being the fact that the former State has been acting not as a State, but as a contracting party in a private capacity. Secondly, the defect which forms the basis of the claim for restitution is inherent in the transaction from its inception. . . .

"As neither the provisions of the Restitution Law nor recognised rules of international law require the exemption of the respondents from the jurisdiction of the German courts, and as moreover the respondents, as contracting parties to a private transaction, are subject to that jurisdiction in accordance with the rules developed by private international law, the claim for restitution has been wrongly dismissed without having been examined on the merits."

[Report: *RZW*, 2 (1951), p. 258.]

Exemption from Jurisdiction—Foreign States—New State—Defence Entered by Predecessor Non-Sovereign Body—Whether Constituting Waiver of Immunity—Succession of Republic of United States of Indonesia to Former Colony of Indonesia. **Case No. 53**

TER K. *v.* STATE OF THE NETHERLANDS, SURINAM AND INDONESIA.

Holland, District Court of The Hague. May 28, 1951.

THE FACTS.—On July 23, 1940, the plaintiff was interned as a member of the Nazi party by the Netherlands Indies authorities, under the rules governing the state of siege, and was summarily dismissed by his employers. After the capitulation of the Netherlands Indies to the Japanese forces he was transported

Case No. 53 *Contd.*

by the Dutch authorities to Surinam, where, he alleged, he was ill-treated. After the war the plaintiff commenced an action in tort, claiming damages in respect of these matters against the three defendants, all in their capacity as legal *personae* (in the private law sense) capable of being sued for torts committed in the exercise of their public powers. Proceedings were commenced prior to the transfer of sovereignty to Indonesia (December 27, 1949). On April 24, 1950, the Republic of the United States of Indonesia (R.I.S.) gave the plaintiff and the first and second defendants notice of suspension of proceedings [1] so far as concerned Indonesia on the ground that all the rights and obligations of Indonesia, which had been a public body under the Netherlands Crown, had in the meantime passed to the R.I.S. Subsequently, the R.I.S. having resolved itself into the Republic of Indonesia,[2] the plaintiff on October 12, 1950, served a writ of summons upon the new Republic. The Republic entered an appearance and claimed as a sovereign State to be immune from the jurisdiction of the Netherlands Court.

Held: that the plea to the jurisdiction must be accepted. After the transfer of sovereignty, Netherlands courts were no longer competent to hear and decide claims which had, before that transfer, regularly been preferred against Indonesia in its capacity as a legal person (a body corporate) under civil law, since that public entity had in the meantime acquired full sovereign status. Even though the competence of a tribunal must, as a general rule, be judged according to the situation existing at the beginning of the action, the legal position changes when during the proceedings the jurisdiction of the Netherlands courts ceases completely to exist. This had occurred in the present case, since Indonesia, the third defendant, had become a sovereign State and was consequently no longer subject to the jurisdiction of a Netherlands court. It could not be said that the Republic of Indonesia had recognized the jurisdiction of the Netherlands Court merely because its predecessor in title [the R.I.S.] had entered a defence in the action without pleading to the jurisdiction of the Court. In fact, that predecessor was subject to the jurisdiction of the Court and therefore could not make such a plea. This incapacity of its predecessor, however, could not affect the Republic of Indonesia, which had properly, as its first step in the action, entered a plea to the jurisdiction of the Netherlands Court.

[Report : *N.J.*, 1952, No. 472.]

---

[1] Under Articles 254–258 of the Netherlands Code of Civil Procedure.

[2] See *International Law Reports*, 1950, p. 199.

Immunity from Jurisdiction—Foreign States—State Commercial Enterprises—*Actes de gestion* and *Actes de pouvoir*—Juridical Personality of State Agencies—Provisional Measures—Seizure by Municipal Courts of Goods belonging to Foreign States in Hands of Third Parties—The Law of Egypt. **Case No. 54**

FEDERATED PEOPLE'S REPUBLIC OF YUGOSLAVIA *v.* KAFR EL-ZAYAT COTTON CO. LTD.

Egypt, Civil Tribunal of Alexandria. May 12, 1951.

THE FACTS.—These proceedings arose out of an objection made by the Federated Republic of Yugoslavia against an order authorizing the Kafr El-Zayat Cotton Company, Ltd. (hereinafter called " the Company "), to take certain measures of sequestration on goods alleged to be the property of the Yugoslav Republic. It appeared that the order had been made by a Judge of the Tribunal of Alexandria on the basis of an application made by the Kafr El-Zayat Co. stating as follows: The Company entered into a contract at Belgrade with the Yugoslav firm of Hempro for the purchase of chemical products, namely, 750 tons of carbonate of soda at £12 a ton; only 250 tons of this product was supplied. The Company alleged that Hempro refused without good reason to deliver the remaining 500 tons, and that the Company was therefore obliged to buy them elsewhere at a total price of £6,500. Hempro had since been nationalized, and formed part of the Federated People's Republic of Yugoslavia. It was argued by the Company that the Republic was responsible to the same extent as Hempro.

The Judge, by his order of March 18, 1951, accepted the above allegations and authorized the Company to sequestrate certain goods of the Yugoslav Republic which were held by the Egyptian Customs authorities, by Barclay's Bank and by the Egyptian National Bank. He also provisionally fixed the damages at £6,500.

The Yugoslav Republic now sought to have this order set aside. Its arguments were as follows: (*a*) Foreign Governments enjoy jurisdictional immunity from suit; (*b*) In accordance with the provisions of its Constitution, the economic and social régime of the Yugoslav Republic places the external trade of the Republic under the control of the Government without, however, affecting the juridical personality of the economic enterprises of the State, which remain exclusively responsible for the performance of their obligations; (*c*) The debt in respect of which sequestration had been demanded was disputed, both as regards its existence and as regards the amount claimed.

The Yugoslav Republic accordingly claimed that the order of March 18, 1951, be set aside, especially inasmuch as it permitted the sequestration of goods in the hands of third parties.

Case No. 54 *Contd.*

Held: that the order must be set aside. The Court said:

"This litigation is commercial and has nothing to do with acts of sovereignty. The debt in respect of which sequestration is claimed is for a fixed amount, being the difference between the contractual price and the cost of buying the goods elsewhere. The Yugoslav State is responsible for the execution of the contract, to the same extent as Hempro, in virtue of the régime in force in Yugoslavia and in virtue of its Constitution.

"Kafr El-Zayat & Co. produced certain letters exchanged between them and the agent at Alexandria of Hempro, by which the latter confirmed the offer made by it to supply 500 tons of carbonate of soda at £12 a ton. Other letters were also produced which had been exchanged between Kafr El-Zayat & Co. and the Chemical Industries Company Ltd., from which it appeared that the latter were prepared immediately to import 1,000 tons of carbonate of soda to the order of the Kafr El-Zayat Co. at £25 a ton.

"As regards that part of the argument of the Yugoslav Republic which consists in the contention that the Egyptian courts should refrain from examining claims against foreign States by reason of the doctrine of the jurisdictional immunity of States and their representatives, it must be recalled that this immunity, which is based on the traditional principles of international law, in accordance with respect for sovereignty, should be applied restrictively, and only in so far as it is necessary to respect such principles. It is necessary to distinguish acts of sovereignty which foreign Governments or their representatives perform in the exercise of their State functions, and which are considered, by their very nature, as acts of sovereignty. Disputes which result from any such acts are not subject to the jurisdiction of national courts. They must be resolved by methods which are in conformity with the rules laid down by public international law, such as diplomatic channels, arbitration or international conferences. As regards any dispute which results from an act done by a foreign State under the same conditions as a private individual, that is subject to the jurisdiction of national courts.

"Case law and doctrine have evolved in the direction of limiting the immunity enjoyed by foreign States and their representatives. This has been done by making the distinction stated above, which has limited immunity to disputes arising from the performance of acts of sovereignty, that is to say, acts which cannot, by their very nature, be performed except by a State, and are considered as acts of public authority and related to the public interest. (Citing Weiss in Hague Academy of International Law, *Recueil des cours* (1923) (i), p. 545, and judgments of the Mixed Court of Appeal of January 10, 1927, June 18, 1923, June 22, 1930, April 20, 1946, February 18, 1948.) The Kafr El-Zayat Cotton Company maintains that the

Yugoslav Government has performed acts of a private law nature in carrying on commercial operations and in nationalizing all external trade. It argues that, as a result, the Yugoslav Government is responsible in respect of all contracts concluded with third parties by the nationalized concerns. The dispute before the Court has no relation at all to acts of sovereignty and it is necessary to reject the first point in the Yugoslav Government's argument. The second and third points in the Yugoslav case are based on the fact that the debt is unliquidated and that there is a serious legal issue on the subject of the responsibility of the Yugoslav Government in respect of contracts made by Hempro.

" The Kafr El-Zayat Co., on the other hand, bases its case on the repudiation of the contract made between it and Hempro, and claims damages in respect of this repudiation to the extent of the difference between the contractual price and the price of goods bought elsewhere. The text of Article 545 of the Code of Procedure requires that, in order to justify a creditor in seizing goods in the hands of third parties, the debt in respect of which seizure is claimed must be for a fixed and ascertained sum. However, the responsibility of the Yugoslav Government for the contract made between Hempro and Kafr El-Zayat & Co., as well as its substantive obligation as regards execution or damages for non-performance, form the subject of a serious dispute between the parties. Kafr El-Zayat & Co. base their case on Article 14 (2) of the Constitution of the Yugoslav Republic (which declares that all mineral wealth in the sub-soil, including mines, is the property of the State). The Company allege that, for this reason, the State of Yugoslavia becomes responsible towards third parties in respect of contracts concluded regarding such minerals. On the other hand, the Yugoslav Government, basing its case on paragraphs 3 and 4 of Article 14, where it is provided that the State itself exploits the mineral resources, or licenses the exploitation of such resources as are within its control, and provides also that external trade is under State control, asserts that Hempro has a patrimony and juridical personality distinct from that of the Yugoslav Government. The interpretation of these texts and their application to the present dispute makes it necessary to analyse the relationship between Hempro, on the one hand, and the Yugoslav Government, on the other, and to ascertain whether this relationship is that of principal and agent, or whether Hempro has the right to contract with third parties in its own name, so that it becomes responsible as a principal. Undoubtedly, an inquiry of this sort involves an investigation into the rights of Hempro over the concern which is operated by it, as well as the determination of the extent of the guarantee enjoyed by third parties who contract with Hempro. Is there, therefore, a legal *nexus* between the Yugoslav Government and

Case No. 54 *Contd.* Hempro, or does Hempro possess the right of separately owning property? What is that property, and does it belong to the Yugoslav Government or to Hempro? It is well established that where a party objects to measures of sequestration, the Court must, without entering upon the merits of the main action, deal with the objection urgently and by summary procedure. The Yugoslav Government rejects all responsibility for the alleged debt by putting forward an argument which goes to the roots of the principal action. Even supposing that the debt which forms the basis of the sequestration was for a fixed sum, and is beyond serious dispute, it appears from the new Egyptian Code of Procedure (Law No. 77 of 1949) that sequestration of goods in the hands of third parties is regarded as a purely provisional measure, irrespective of the nature of the debt. Article 547 of the Code clearly bears out this construction. Following upon the principle of immunity which the representatives of all foreign States enjoy, and in spite of the fact that the present litigation is the result of a purely commercial operation, such as that into which private individuals commonly enter, and has nothing to do with those acts which are considered, by their very nature, as being acts of sovereignty, it is generally agreed by the majority of writers on international law, and is in conformity with international usage and courtesy, that the seizure of the goods of a foreign State, whether purely as a provisional measure or with the object of preventing that Government from taking the goods out of the jurisdiction, is an act which touches the sovereignty of the State. For such an act raises doubts in the minds of third parties concerning such sovereignty which it is the duty of this Court to avoid. Inasmuch as there exists serious doubt concerning the debt, and that the seizure is a purely provisional measure which may affect Yugoslav sovereignty, the order of March 18, 1951, is set aside."

[Report: *Revue égyptienne de Droit international*, 7 (1951), p. 179.]

Case No. 55 **Jurisdiction — Exemption from — Foreign States — Action against Foreign Military Authorities to Recover Rent and Possession of Buildings—Foreign State as Real Party in Interest.**

SYQUIA *ET AL.* *v.* LÓPEZ *ET AL.*

Philippines, Supreme Court. August 17, 1949.

THE FACTS.—In 1945 the plaintiffs leased three apartment buildings in Manila to the United States for use in housing military personnel, the period of the lease being "for the duration of the war and six months thereafter unless sooner terminated by the United States of America ". On the theory that the war ended on September 2, 1945, when the Japanese Government surrendered, the plaintiff requested the return of the apartments in March 1946, but the United States declined to do so. On January 1, 1947, the United States stopped paying rent on the buildings but continued to occupy them.

In March 1947, after several other demands for the return of the property had been refused, the plaintiffs brought an action in the Municipal Court of Manila against General George F. Moore, the commander of the United States military forces in Manila, his assistant in charge of real estate, Erland Tillman, and the 64 officers occupying the apartments. The plaintiffs petitioned the Court to order the vacation of the apartments, to require each occupant to pay *P*300 per month (a sum greater than that provided for in the leases) from January 1, 1947, until the date of vacation, to require the defendants to allow the plaintiffs to enter the premises for the purpose of appraising the damage done during the occupancy, to require the defendants to pay for any damage done, and finally, in the event that the other defendants were unable to pay, to require the defendants Moore and Tillman to pay the rent and damages. The Municipal Court dismissed the action on the ground that the war was not yet at an end and that the three leases had therefore not expired. It also held that the United States was the " real defendant " in the case and that a suit could not be maintained against the United States in a foreign court without its consent. The plaintiffs appealed to the Court of First Instance of Manila and contended that courts have jurisdiction to entertain actions by private parties to recover possession of premises occupied by officers acting in the name of a foreign Government, even though no action can be brought against that Government itself. The Court of First Instance of Manila affirmed the decision of the Municipal Court. The plaintiffs then petitioned the Supreme Court for a writ of mandamus ordering the Municipal Court of Manila to take jurisdiction over the case.

The apartments were vacated early in 1948, while the question was still before the Court, and in June 1948 the rent due under the leases was paid. The defendants requested that the Court dismiss the petition. They maintained that the question had become moot, since Moore and Tillman had left the islands and the plaintiffs had received both possession of the apartments and the rent due. However, the Court accepted the suggestion of the plaintiffs that a decision be rendered to serve as a guide for future cases.

Held: that the case must be dismissed. Although courts normally had jurisdiction to hear actions for the recovery of property in the possession of officers of a foreign Government,

Case No. 55 *Contd.* they could not entertain such a suit without the consent of the defendant Government if the judgment would also require the payment of damages. The real party in interest as defendant in this case was the United States, and there was no basis for holding the defendants individually responsible for the rentals or damage. Since the damage and rentals would thus be a charge against the United States, the courts lacked jurisdiction to decide the case. The Court said :

" We shall concede, as correctly did the Court of First Instance, that following the doctrine laid down in the cases of *U.S.* v. *Lee*[1] and *U.S.* v. *Tindal*,[2] . . . a private citizen claiming title and right of possession of a certain property may, to recover possession of said property, sue as individuals, officers and agents of the Government who are said to be illegally withholding the same from him, though in doing so, said officers and agents claim that they are acting for the Government, and the courts may entertain such a suit altho the Government itself is not included as a party-defendant. Of course, the Government is not bound or concluded by the decision. The philosophy of this ruling is that unless the courts are permitted to take cognizance and to assume jurisdiction over such a case, a private citizen would be helpless and without redress and protection of his rights which may have been invaded by the officers of the government professing to act in its name. In such a case the officials or agents asserting rightful possession must prove and justify their claim before the courts, when it is made to appear in the suit against them that the title and right of possession is in the private citizen. However, and this is important, where the judgment in such a case would result not only in the recovery of possession of the property in favor of said citizen but also in a charge against or financial liability to the Government, then the suit should be regarded as one against the government itself, and, consequently, it cannot prosper or be validly entertained by the courts except with the consent of said Government. (See case of *Land* v. *Dollar*, 91 Law. ed., 1209.[3])

" From a careful study of this case, considering the facts involved therein as well as those of public knowledge of which we take judicial cognizance, we are convinced that the real party in interest as defendant in the original case is the United States of America. The lessee in each of the three lease agreements was the United States of America and the lease agreements themselves were executed in her name by her officials acting as her agents. The consideration or rentals was always paid by the U.S. Government. The original action in the municipal court was brought on the basis of these three lease contracts and it is obvious in the opinion of this court that any back rentals or increased rentals will have to be paid by the U.S. Government not only because, as already stated, the contracts of lease were entered into by such Government but also because the premises were used by officers of her armed forces during the war and immediately after the termination of hostilities."

---

[1] *United States* v. *Lee* (1882), 106 U.S. 196.
[2] *Tindal* v. *Wesley* (1897), 167 U.S. 204.
[3] *Land* v. *Dollar* (1947), 330 U.S. 731.

The Court here considered the liability of the individual defendants and concluded that they could not be held liable, since they had acted within the scope of their official duties.

" On the basis of the foregoing considerations we are of the belief and we hold that the real party defendant in interest is the Government of the United States of America ; that any judgment for back or increased rentals or damages will have to be paid not by defendants Moore and Tillman and their 64 co-defendants but by the said U.S. Government. On the basis of the ruling in the case of *Land* v. *Dollar* already cited, and on what we have already stated, the present action must be considered as one against the U.S. Government. It is clear that the courts of the Philippines including the Municipal Court of Manila have no jurisdiction over the present case for unlawful detainer. The question of lack of jurisdiction was raised and interposed at the very beginning of the action. The U.S. Government has not given its consent to the filing of this suit which is essentially against her, though not in name. Moreover, this is not only a case of a citizen filing a suit against his own Government without the latter's consent but it is of a citizen filing an action against a foreign government without said government's consent, which renders more obvious the lack of jurisdiction of the courts of his country. The principles of law behind this rule are so elementary and of such general acceptance that we deem it unnecessary to cite authorities in support thereof."

One Judge dissented on the following grounds :

" The contention that the Government of the United States of America is the real party defendant does not appear to be supported either by the pleadings or by the text of the contract of lease in question. If said government is the real party defendant and had intended to impugn the jurisdiction of the Municipal Court of Manila, it must have done so through its diplomatic representative in the Philippines, *i.e.*, the American Ambassador. It does not appear that the American Ambassador had intervened in the case in any way and we believe no one appearing in the case has the legal personality to represent said government.

" In the hypothesis that the Government of the United States of America is the lessee in the contract in question and, therefore, should be considered as the real party defendant in the ejectment case, that simple fact does not deprive our

Case No. 55 Contd. courts of justice of their jurisdiction to try any legal litigation relating to said contract of lease. The very fact that the government of the United States of America had entered into a private contract with private citizens of the Philippines and the deed executed in our country concerns real property located in Manila places said government, for purposes of the jurisdiction of our courts, on the same legal level as the lessors.

" Although, generally, foreign governments are beyond the jurisdiction of domestic courts of justice, such rule is inapplicable to cases in which the foreign government enters into private contracts with the citizens of the court's jurisdiction. A contrary view would simply run against all principles of decency and [be] violative of all tenets of morals. . . ."

[Report : *Off. Gaz.*, 47 (1951), p. 665.]

Jurisdiction—Exemption from—Foreign States—Immunity from Execution—Economic Activities.

See Case No. 2 (*Socobel* v. *Greek State*).

(d) FOREIGN ARMED FORCES

Jurisdiction—Exemptions from—Armed Forces Stationed in Foreign Territory—Torts Committed by Members of Such Forces—Jurisdiction of Municipal Courts—The Law of Luxemburg.

See Case No. 117 (*Office d'Aide Mutuelle Interalliée* (*OMA*) v. *Koerperich*).

ix.—Irregular Apprehension

Case No. 56 **Jurisdiction—Irregular Apprehension—Action of Officers of Foreign Sovereign in Territory of the Foreign Sovereign—Power of Municipal Court to Comment thereon.**

LEMMEL AND OTHERS *v.* REX.

West Indies, Court of Appeal (*on Appeal from the Supreme Court of British Guiana*).
(Furness-Smith C.P., Worley C.J., Jackson C.J.)
February 19 and 26, 1951.

THE FACTS.—During the trial of the three appellants on charges of breaking, entering, and stealing from a pawnbrokery, and of receiving stolen goods, it was objected that the Supreme Court of British Guiana had no jurisdiction over the accused because the detention or arrest of the accused had been effected in Venezuela, a foreign sovereign State, by officers of that State who had permitted officers of the British Guiana police force to arrest the accused and bring them into the Colony for trial. The trial Judge ruled that the Court had jurisdiction, and the appellants were convicted. The appellants appealed against this ruling.

Held: that the appeal must be dismissed. The ruling of the trial Judge " was correct and in accordance with the established principle of law that ' summonses, warrants and arrests are mere machinery for securing the attendance of an accused person, and the invalidity of any of these preliminary steps will not affect the jurisdiction of the justices if the accused person appears and the charge is one which the justices have power to investigate ' ". A British Court had no jurisdiction to comment upon the activities of the officers of a foreign sovereign State acting in the territory of that State.

The Court said : ". . . In our opinion the objections raised are fully met by the provisions of sub-section (2) of section 57 of the Criminal Law (Procedure) Ordinance, which provides as follows :

> ' (2) When any accused person is before a magistrate, whether voluntarily or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence, the preliminary inquiry may be held notwithstanding any irregularity, illegality, defect, or error in the summons or warrant, or the issuing, service or execution thereof, and notwithstanding the want of any information upon oath, or any defect in the information, or any irregularity or illegality in the arrest or custody of the accused person.'

This sub-section embodies the principle set out in Vol. IX, para. 102, of Halsbury's *Laws of England*, 2nd ed., p. 77, as follows :

> ' Summonses, warrants and arrests are mere machinery for securing the attendance of an accused person, and the invalidity of any of these preliminary steps will not affect the jurisdiction of the justices if the accused person appears and the charge is one which the justices have power to investigate.'

See also *Reg.* v. *Hughes*, (1879) 4 Q.B.D. 614 : and *Ex parte Elliott*, [1949] 1 A.E.R. 373.

" In so far as it is alleged that these men were illegally arrested or detained by officers of the foreign sovereign State of Venezuela it is very clear that this Court has no jurisdiction to enquire into the conduct of those officers or to pass judgment

Case No. 56 *Contd.* on them. In this connection the words of Lord Tenterden in *Ex parte Susannah Scott*, (1829) 9 B. & C. 446, at 448, are very apt :

> ' If the act complained of were done against the law of the foreign country, that country might have vindicated its own law. If it gave her a right of action, she may sue upon it.'

" These words are also, *mutatis mutandis*, an apt reply to the allegations against the officers of the Police Force of this Colony who were concerned in effecting the arrest of these men.

" The legality or otherwise of the arrest or of the warrant leading to the arrest of a prisoner cannot be put in issue in his trial upon a criminal charge : the action for false imprisonment is the proper remedy."

[Report : (1951) L.R.B.G. 59.]

II.—Personal

i.—Over Nationals in Respect of Crimes Committed Abroad

Case No. 57 **Jurisdiction—Over Nationals in Respect of Crimes Committed Abroad—Soldiers in Occupied Enemy Territory—Belligerent Occupation—Nature and Effects of Occupation.**

SAELENS *v.* M.P.

Belgium, Military Tribunal, Brussels. July 19, 1950.

THE FACTS.—The accused, a Belgian soldier belonging to the army of occupation in Germany, was charged with having committed a traffic offence in occupied German territory. The main question before the Tribunal was whether the Belgian highway code was applicable to Belgian soldiers on German territory.

Held: that the case was irreceivable. While, in principle, soldiers belonging to an army of occupation are subject to their national law, the Belgian highway code applied only to traffic on Belgian territory. The Court said :

" It cannot be denied that soldiers belonging to an army of occupation are subject to their national criminal law in occupied territory, and must, accordingly, be tried by their national courts for offences they may have committed in occupied territory. In view of the agreements concluded between the two countries concerned, this well-established general rule of law is in no way modified by the fact that the Belgian zone of occupation forms part of the British zone.

"The Public Prosecutor adds, correctly, that offences committed by members of an army of occupation in occupied territory are considered to have been committed within the frontiers of the territory of the State to which that army belongs.

"From this the Public Prosecutor would draw the conclusion that the provisions of the highway code are binding on and must be applied to members of the Belgian army in the zone of occupation.

"However, this does not take into account the special character and aim of the highway code, which is the regulation of traffic, exclusively on Belgian territory. The Belgian Legislature states expressly that it has respected the requirements of the international convention on road traffic of April 24, 1926. Article 8 of that Convention provides that the driver of an automobile who stays in a foreign country must respect the laws and regulations relating to road traffic in force in that country.

"It should be added that Belgium has not signed the road traffic Convention, by which a number of countries agreed on uniform legislation covering some major rules relating to the direction of traffic, overtaking, crossing, crossroads and junctions.

"Both Germany and Great Britain have accepted the Convention of April 24, 1926. Great Britain in her zone of occupation, which includes the territory occupied by the Belgian army, has maintained the German highway code in force. The fact that that Code contains provisions which are identical with or similar to those of the Belgian code does not make the latter applicable in the occupied territory. On the other hand, the Belgian Legislature has not subjected the members of its occupation forces to the German law in the matter."

[Unreported.]

PART VI

THE INDIVIDUAL IN INTERNATIONAL LAW

A—IN GENERAL

I.—Position of Individuals in International Law. Human Rights and Freedoms

[See also Part I, INTERNATIONAL LAW IN GENERAL: IV, *Relation to Municipal Law*; and Part VIII, TREATIES: IX, *Operation and Enforcement of Treaties.*]

Case No. 58 **Human Rights—Mandate for Palestine Being Interpreted by Court of State of Israel—Provision Forbidding Discrimination on Grounds of Race, Religion or Language—Provisions Forbidding Restrictions on Freedom of Conscience—Meaning of Discrimination—Meaning of Freedom of Conscience—Polygamous Marriages Permitted in Certain Circumstances by Religious Law—Prosecution for Bigamy—The Law of Israel.**

YOSIPOF *v.* ATTORNEY-GENERAL.

Israel, Supreme Court sitting as the Court of Criminal Appeals.
(Smoira C.J., Silberg and Landau JJ.)
March 29, 1951.

THE FACTS.—This was an appeal against a conviction for bigamy contrary to s. 181 of the Criminal Code Ordinance, 1936, as amended. The appellant was a Jew, a member of the Caucasian Jewish community. In 1938 he married X. This marriage is still subsisting. In 1940, with the consent of the Rabbinic authorities in Jerusalem, he married Y. The consent of the Rabbinic authorities was obtained on the basis of false evidence. Section 181 of the Criminal Code Ordinance, 1936, provided:

> " Any person who, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, is guilty of a felony . . . termed bigamy."

It then went on to describe three defences, which are similar to those of English law. The words " in any case . . . or wife " were introduced by the legislator in order to accommodate the law to the provisions of the Islamic religious law which permits polygamy. However, Jewish religious law also, in certain circumstances, permits polygamy, a fact which had been overlooked by the draftsman, and it was later judicially established that s. 181 does not preclude this. Consequently, in 1947, s. 181 was amended to read :

> " Any person who, having a husband or wife living, marries any other person during the life of such husband or wife (whether or not the subsequent marriage is void or voidable) is guilty of the felony of bigamy. . . . Provided that it is a good defence . . . to prove—(*d*) that the law as to marriage applicable to the husband at the date of the subsequent marriage was Jewish law and that a final decree of a Rabbinical Court . . . ratified by the two Chief Rabbis for Palestine and giving permission for the subsequent marriage, had been obtained prior to the subsequent marriage."

Article 17 (1)(A) of the Palestine Orders-in-Council, 1922–39, provided that the High Commissioner should have full power and authority to promulgate such Ordinances as might be necessary for the peace, order and good government of Palestine, " provided that no Ordinance shall be promulgated which shall restrict complete freedom of conscience and the free exercise of all forms of worship, save in so far as is required for the maintenance of public order and morals ; or which shall tend to discriminate in any way between the inhabitants of Palestine on the ground of race, religion or language ". This provision has its origin in Article 15 of the Mandate, of which it is an almost literal copy. On behalf of the appellant it was argued that s. 181 of the Ordinance, in its amended form, interfered with the freedom of conscience and was discriminatory against Jews, and was therefore void.

Held : that the appeal must be dismissed and the conviction sustained. The amendments to the Criminal Code Ordinance were not contrary to the Mandate.

Per Landau J. : " First it must be pointed out that Article 17 (1)(A) of the Order-in-Council does not state, in general terms, that all discrimination is forbidden, but it refers to three different variations of discrimination, namely, on grounds of race, religion or language. Does s. 181 recognize religion as a distinctive element ? . . . The matter gives rise to some doubt. The Mandatory Courts recognized Jewish law as the 'national law' of Palestinian Jews. . . . We do not think that by referring to Jewish law in the amended s. 181 the Mandatory legislator was intending to limit this phrase only to Jews who were officially members of the Jewish community. He intentionally created a special category of persons, distinguished by their personal law. True, in so far as concerns Article (17) (1)(A) of the Order-in-Council, this does not change the situation much, for if the distinguishing feature of s. 181 is not religion, we are none the less forced to the conclusion that it is race, or a mixture of race and religion. . . .

Case No. 58 *Contd.*

" What is the true meaning of ' Discrimination ' as it appears in Article 17 (1)(A) ? Etymologically speaking, the English meaning is " setting apart ', and the discrimination may be favourable or unfavourable. But sociologically speaking the word has a somewhat narrower meaning." The Judge here quoted from p. 131 of volume 14 of the *Encyclopaedia of Social Sciences* (New York, 1948) and went on :

" These ideas are not purely legal ones. They are common to all peoples having a democratic tradition, and therefore we do not hesitate to quote from an American non-legal source. Here we see that the distinguishing feature of discrimination is unequal and unfair treatment of certain classes of persons. This was the attitude adopted also by the Mandatory Judges, see *Attorney-General* v. *Altshuler* (*Annual Digest*, 1927–1928, Case No. 33). . . . *Cf.* also Exodus 8:18 and 11:7 for this meaning of ' setting apart '. . . .

" We have said that discrimination means setting apart, favourably or unfavourably. Article 17 (1)(A) does not prevent a different legislative solution for different classes of persons, on condition that such solution contains no element of ' discrimination '. Other legislation, for example, takes account of differences of language. Would it occur to us to say that there is here discrimination simply because, objectively speaking, there is no uniformity ? To the contrary : this is rather a practical way of securing equality of status for each of the three official languages. Similarly in regard to marriage. The Mandatory legislator decided that the time had come to make bigamy a criminal offence. He had two ways of doing this : either by issuing a general prohibition applicable to all the religious communities, or by effecting a compromise between his basic premiss as to the undesirability of bigamy and the sociological realities of the country. Counsel for the appellant did not deny that legally the first method was possible, but he argued that the method of establishing different rules of law for different communities was improper. We cannot agree to this. A legislator does not work in a vacuum, but in an existing social milieu for which he has to create legal forms and even to mould future legal developments. As for marriage, the legislator had, as his ' raw material ', a multifarious pattern of fundamental ideas deriving from the heterogeneity of the population, each part of which had its own laws and customs. How can it be said that the Mandatory legislator infringed the non-discrimination rule simply because, instead of riding roughshod over the realities, he attempted to accommodate himself to them ? More than this. Here we are not dealing with a difference of realities alone, but with a difference which had been clothed in legal form even before the Mandatory legislator commenced his work. [Here the Judge traced the system through to that in force in the days of the Ottoman

Empire, and concluded :] The Mandatory legislator was fully consistent, and when he drafted s. 181, not on the basis of uniformity but on that of heterogeneity, he was working on lines laid down long before.

" Counsel for the appellant was, however, right in saying that ultimately the test must remain an objective one. The legislator's aims may be unobjectionable, yet he may fail because his solution may operate unfairly on certain classes, and thus discriminate against them. For this reason we are obliged to examine the details of his enactment, and if it established that, reduced to fundamentals, the legislator did not enact a discriminatory law, we will uphold his enactment. . . ."

After establishing, subjectively and objectively, that the Law was not discriminatory, the Judge went on to consider an argument that it nevertheless conflicted with the provisions relating to freedom of worship—which was found not to arise—and freedom of conscience. " This is a concept of ethics, which is concerned with good and evil. A man can derive his conception of good and evil from sources which are not religious. However, for a religious man, his conscience is guided by the injunctions of his religion. Consequently we accept the assumption that the concept of freedom of conscience requires, to be complete, also freedom of religion. In this context it was argued for the appellant that the Mandatory legislator trespassed into the sphere of religion, for according to the Order-in-Council marriage is a religious institution. Freedom of conscience means freedom to live according to the injunctions of religion. Jewish religious law permits polygamy at least in certain communities which did not receive [a certain tenth-century rabbinic enactment forbidding polygamy known as the ' Herem di Rabbi Gershom '. These were the oriental Jewish communities, of one of which the appellant was a member.] . . . It is immaterial whether the appellant belongs to one of these communities because the test must be an objective one. And if s. 181 infringes the religious customs of any single community, it is void. . . .

" We do not think that the concept of freedom of conscience is restricted to freedom of thought. A man who enjoys freedom of conscience cannot be denied the right to practise the dictates of his conscience. The proviso to Article 17 (1)(A) relating to public order is sufficient to prevent detrimental activities which it might be sought to justify on the plea of freedom of conscience. Even *Shanti* v. *Attorney-General* (*Annual Digest*, 1935–1937, Case No. 31) does not go so far as to restrict freedom of conscience to metaphysical ideas alone."

After rejecting, on various grounds, the arguments put forward on behalf of the appellant, the Judge concluded : " Infringement of freedom of religion can only exist where a religion demands or forbids a certain thing and the secular

Case No. 58 *Contd.*

legislator compels an infringement of the religious injunction. One cannot talk of infringement of freedom of religion when one is speaking of acts which the religion merely permits, without there being any question of such acts being in the nature of a positive (or negative) injunction of that religion. . . ."

Per Silberg J.: "I cannot accept the argument of the State Attorney that the protection of freedom of conscience is restricted to freedom of thought. Metaphysical ideas cannot be punished, nor subjected to any other sanction, and therefore do not need protection. From this it follows that the freedom of conscience protected by the legislator must include acts and deeds, the product of the conscience, provided only that they do not exceed the proper limits of individual behaviour on the part of those who perform them. If, however, they do exceed those limits, then the law can take cognizance of them, as of any other act. The question here is whether s. 181 infringes the freedom of conscience of the individual. I can limit this question further: does the section infringe the individual freedom of conscience of the appellant, in the circumstances of which we are seised . . . ? How, then, is the freedom of conscience likely to be infringed?

"There is no doubt that freedom of conscience includes freedom of religion. But before any prohibition of the law can be regarded as infringing freedom of religion, it is not sufficient to prove that the religion does not forbid a certain act. It is necessary to go further and prove that the act considered a crime is a positive injunction in the eyes of the religion, which demands its adherents to perform it. Not everything permitted by religion has to be permitted by the law, for the two concepts are not co-terminous. Religion is concerned with man's attitude to God and man's attitude to his fellows: whereas the law concerns a man's relations with the State. Looked at in this light, we do not need to see to what extent polygamy is permitted for certain Jews by Jewish law. The constitutional validity of s. 181 will not be diminished one jot if we were to assume . . . that the Herem di Rabbi Gershom [*supra*] does not apply to Jews coming from Caucasia. There is no need for us to probe into this very interesting question of Rabbinic law. . . . The correct way of putting the question therefore is: does Jewish religious law compel polygamy or not. [The Judge here dealt with the appellant's contention that Rabbinic law as applied to and by Caucasian Jews does compel polygamy, a contention which he rejected.] Without going into the question of the proper interpretation of Article 17 of the Order-in-Council, that is to say, whether it prohibits the enactment of legislation *a priori* designed to infringe religious injunctions, or whether it also voids any law likely, in certain circumstances, to prevent the performance of some religious duty—without going into this question, the language of s. 181 gives a clear and simple answer to the appellant's arguments, for it contains within itself provisions intended to prevent all conflict between the law and religion, by providing in sub-section (*d*) a special method of resolving such conflicts. . . ."

The Judge then went on to deal with the appellant's argument that with reference to the proviso regarding public order and morals in Article 17 of the Order-in-Council, the word " public " means " all the public " and not any part of it. " I do not know on what this theory is based, and particularly whether it has or had any place in the conditions existing under the Mandate. To me it seems that when you have a heterogeneous, culturally mixed population such as that of Mandated Palestine, it is quite easy to imagine that a particular law is necessary for the preservation of order in one only of the several sectors of population found in the country. It is hard to conceive that this is not so. The word ' order ' does not merely mean an absence of disturbances. It also includes preservation of patterns of living and certain cultural values in which that particular sector of the population is interested. That being so, the amendment to s. 181, which was enacted in response to the pressure of Jewish public opinion, is valid and unobjectionable on any interpretation of Article 17. . . ."

From here the Judge passed to the plea of discrimination. He pointed out that Article 17 forbids all discrimination, whether or not it is necessary for the preservation of public order. He summarized the appellant's argument as being that, according to s. 181, polygamy is lawful for Muslims and forbidden to Jews and Christians, from which it follows that the law discriminates on religious grounds between one person and another. " There is no complaint that as polygamy is lawful for Muslims, therefore the law discriminates in their favour, because it was not made lawful for Muslims by this legislative act but was always lawful even before the enactment of the law. The real complaint is that s. 181 prohibits bigamy for Jews even more than it does for the adherents of other faiths, for it is prohibited even where the religious law permits it. In that sense s. 181 is discriminatory against Jews. Even so it is not clear whether the complaint is of racial or religious discrimination. [The Judge analysed s. 181 and found—] Section 181 postulates conviction and punishment not on the racial association of the accused, nor on his religious tenets, but on a third test, different from these, namely : the legal system by which his marriage was governed. The difference in the legal treatment laid down for Jews and that laid down for all others is that for a man not governed by Jewish law it is sufficient to prove, even at the trial itself, that his personal law permitted him more than one wife, whereas a man who is governed by Jewish law must prove that before he contracted his second marriage he obtained a certain certificate which established that

Case No. 58 *Contd.*

he, individually, was permitted to take a second wife. . . . This is where the plea of discrimination falls away completely. This can be better explained when we consider the special place assumed by the concept of personal status in the general civil law of the country.

" The legislator, as is well known, discarded his authority to determine new rules of law in matters of personal status and, in general, conferred this authority, whether in matters of procedure or in matters of substance, on the religious laws of the various religious communities. . . . The question arises as to the effect of this. Did the legislator leave here, from a legislative point of view, a vacuum to be filled by foreign legal norms having no part in his legal system ? Or is it more correct to say that the legislator accepted into his own legal system those legal norms, which thereby became an integral part of his—civil—legal system ? As we shall see, this is not a theoretical and academic question.

" Whatever the position before 1945, the Interpretation Ordinance of that year sets the matter at rest by providing, in s. 2, that ' law ' includes ' religious law (whether written or unwritten) . . . which is . . . now, or hereafter may be, in force in Palestine '. Here the legislator unambiguously indicated his opinion that religious law is an integral part of the law of the land. . . . How does this influence the matter before us ? The answer is quite clear. The fundamental object of s. 181—read in its entirety—is to avoid an inherent and illogical conflict between the different parts of the law of the land. There is no uniform system of marriage and divorce for all the inhabitants of the country. Consequently it would not be possible to provide uniformity in the criminal law. The disuniformity between the civil permission to take more than one wife and the criminal prohibition of bigamy has to be overcome. Jewish law recognizes the validity of a second marriage while the first is still subsisting, though it does not permit polygamy in general. On the contrary, its attitude towards polygamy is a negative one, and it is only permitted by way of exception. Here the legislator found himself in a difficulty, from a legal point of view, which he could not solve unaided. For this reason he created the special machinery of the Rabbinical Court with the ratification of the two Chief Rabbis, to which alone was given authority to decide—and hence to exempt from punishment—whether the husband could or could not take a second wife. In short : the legislator did not act arbitrarily, nor did he impose any discrimination on grounds of religion or race. Even as regards Jews the legislator did not retreat from his fundamental idea that the civil and criminal conceptions of polygamy must be kept in step. However, he held back from taking part himself in the civil aspect—remembering his earlier failure—and he remitted the decision to more qualified hands, the Rabbinate, which would decide on the matter *before* the performance of the act. Consequently there is here no racial or religious discrimination, or indeed any discrimination without any qualification, but a necessary consequence of the divergence between the different parts of the law by which the personal status of the citizen is regulated. For if within the sphere of civil law of personal status the legislator was compelled to enforce, through the systems of religious law, divergent legal norms for each separate community without anyone complaining of this, what he has done in the sphere of criminal law is only the logical and practical consequence of these divergences.

" Finally . . . Not all setting apart is discrimination, and at times it is no more than distinction ; that is to say, when there exists a real difference between the objects of the discrimination, from whatever aspect, and the setting apart is not arbitrary. What underlies the prohibition on discrimination is : not to *restrict* a man *only* because of his racial or religious association. There is no discrimination if the elements emphasized do not exist. The ' discrimination ' of s. 181 is no more than a distinction. The polygamist is not punished *because* he is a Jew, but he is prevented, by a specific provision of the law and by punishment, from performing an act for the reason that the body with which he is associated—the Jewish community—has found that polygamy is not compatible with its conceptions of social discipline and culture, and cannot therefore allow the sanction formerly given to polygamy to continue to exist. For this reason that body asked the legislator—and he responded—to prohibit polygamy, for its own good. Consequently, there is no forbidden discrimination here, but rather a permitted distinction which is not contrary to Article 17 (1)(A). . . ."

[Reports : *Piskei-Din*, 5 (1951), p. 481 ; *Pesakim Elyonim*, 4 (1951), p. 166. For the decision of the Jerusalem District Court, November 11, 1950, see *Pesakim Mehoziim*, 4 (1949-1950), p. 457.]

NOTE.—In *Malham* v. *Acre Sharia Court*, decided by the Supreme Court sitting as the High Court of Justice on July 8, 1954, the application of this doctrine was extended to Muslims, for whom polygamy is permitted by religious law. By the Women's Equal Rights Law, 5711–1951 (see *Yearbook on Human Rights for 1951*, at p. 185), the Criminal Code of 1936 was further amended so as to cancel the defence to a charge of bigamy, therein provided for, although the law itself did not affect any legal provision or permission relating to marriage or divorce. This was held to be not discriminatory. [*Piskei-Din*, 8 (1954), p. 910 ; *Pesakim Elyonim*, 16 (1954), p. 70.]

Individual in International Law—Human Rights—Universal Declaration of Human Rights, 1948—Deprivation of Nationality.

See Case No. 68 (*In re Krüger*).

II.—Before International Tribunals

Individual in International Law—Position with regard to Proceedings between Governments before International Tribunals.

See Case No. 136 (*Ottoz Claim*).

B—NATIONALITY

I.—In General. Proof of Nationality

Nationality—Acquisition of—Proof of.

See Case No. 82 (*Gerbaud* v. *Meden*).

II.—Acquisition of Nationality. Nationality as Affected by Changes of Sovereignty

Case No. 59 **Nationality—Effect of Change of Sovereignty—Change of Nationality on Annexation of State—National of Annexed State Abroad at Time of Annexation—Whether He May Opt to Become Stateless—Whether Enemy National in case of War with Annexing State—Annexation of Austria by Germany.**

IN THE MATTER OF MANGOLD'S PATENT.

England, High Court of Justice, Chancery Division.
(Lloyd-Jacob J.)
October 9, 1950.

THE FACTS.—This was an application for the extension of a patent. The applicant was an Austrian national at the time of the *Anschluss* in March 1938. He had been resident in England since 1937, and had unsuccessfully applied for British naturalization. Section 24 (1) of the Patents Act, 1949, provides that the Court may by order extend the term of a patent if the patentee had suffered loss or damage by reason of hostilities between His Majesty and any foreign State. Section 24 (8), however, provides that no order shall be made, *inter alia*, on the application of a person who is a subject of such a foreign State as is mentioned in s. 24 (1) (*viz.* if the applicant is a national of an enemy State), and that no account shall be taken of any loss or damage suffered by any person during any period when he was such a subject. The question was, therefore, whether the applicant was at the material times an enemy national.

In March 1938, Germany invaded and annexed Austria. On April 2, 1938, His Majesty's Government recognized that annexation. On July 3, 1938, a German Decree granted German nationality to all Austrian nationals. On September 3, 1939, His Majesty declared war on Germany, and on May 8, 1945, the German armed forces surrendered unconditionally. On November 1, 1943, the Governments of the United Kingdom, the United States and the U.S.S.R. issued the Moscow Declaration that the German annexation of Austria was " null and void ". On January 5, 1946, His Majesty's Government recognized Austria as a State, and on September 16, 1947, the formal state of war between His Majesty and Austria was terminated.

Held: that the application must be dismissed. Lloyd-Jacob J. said:

" By this summons the Applicant seeks an extension of the term of Letters Patent No. 389,848 on the ground of war loss.

" The circumstances set out in the affidavits filed in support are such as to justify such extension, if the application is not excluded by the express provisions of the Statute, and the question falls to be determined whether *Stefan Mangold* (who is the patentee as such) is a subject of a state between whom and His Majesty hostilities were in progress during the relevant period.

" The said *Stefan Mangold* was an Austrian by birth and so described himself in the application for the Letters Patent in suit. At the date of application he was residing in his country of origin and in 1937 he came to Great Britain, where he has since resided. During his residence in this country he has unsuccessfully applied for naturalisation as a British subject.

" On the 13th March, 1938, Austria was annexed by Germany, which annexation was recognized by His Majesty's Government on the 2nd April, 1938. The declaration of war by His Majesty on the 3rd September, 1939, on Germany therefore related to a state whose territory included the former Austrian state territory and persons who were Austrian nationals at the time of annexation in March, 1938, were from the outbreak of war enemy aliens.

" The unconditional surrender of the armed forces of the German state was accepted on the 8th May, 1945.

" On the 5th January, 1946, His Majesty's Government recognized the existence of Austria as a state, and on the 16th September, 1947, the formal state of war between His Majesty and Austria was terminated. This termination was applicable to the state of Austria as recognized on the 5th January, 1946, and does not necessarily imply the existence of any state of war between His Majesty and the state of Austria prior to such recognition. Indeed, between the dates of the recognition of annexation in March, 1938, and of the independence in

Case No. 59 *Contd.*

September, 1947, no state of Austria as such existed with whom His Majesty could be at war.

"It appears, therefore, to follow that the enquiry can be narrowed down to the simple question whether or not the Applicant was a subject of Germany, by reason of the recognized annexation of Austria by that power in March, 1938. If by German municipal law he should be so regarded, the recognition of the annexation in my judgment denies the existence of any right on the part of the Applicant himself to elect either to remain Austrian or to become stateless, and only the positive acquisition of another nationality by an acknowledged change of allegiance would avail to exclude the bar which the Patents Act contains. It is, moreover, to be noted that the relevant German municipal law for this purpose must be that in operation prior to the outbreak of hostilities, and that any German decree which purported during the war to relieve German nationals of their allegiance is not one which the Courts of this country will recognize (see *The King* v. *The Home Secretary* (*ex parte L.*) [1945] 1 K.B. 7).

"Apart from certain statements of information and belief in the Applicant's affidavits (the source of which is not therein acknowledged), no evidence is before me from which the relevant German municipal law can be gleaned, and the published reports of decided cases appear to show that a German decree of 3rd July, 1938, imposed German nationality upon the subjects of the annexed territory.

"The Applicant has not, therefore, discharged the burden resting upon him of satisfying me that he comes within the provisions of the Act. It may be, however, that the failure to adduce evidence was attributable to the erroneous view that the Applicant was a stateless person. I shall therefore direct that, if within a suitable period of time evidence is filed dealing with the relevant German municipal law, the case may be restored to the list for further hearing. If the case is not so restored, the summons will be dismissed and the Applicant will pay the costs of the *Comptroller-General.*"

[Report : 68 R.P.C. 1.]

NOTE.—For a criticism of this decision see *British Year Book of International Law*, 1951, p. 406.

Case No. 60 Nationality—Acquisition of—Children Born in France of Alien Parents—Legal Requirements—Military Service.

In re D' AMICO.

France, Court of Appeal of Aix. March 5, 1951.

THE FACTS.—The petitioner was born in 1921 in Marseilles, of Italian parents. In 1945 he performed his military service in the French army. He now claimed French nationality on the basis of two provisions of the French Nationality Law of 1927. In the first instance, he invoked a provision to the effect that any male child born in France of alien parents, and who is domiciled in France, acquires French nationality at the age of 18. Secondly, he invoked a provision entitling such persons to opt for French nationality on voluntarily enlisting in the French army.

Held: that the petitioner was not entitled to French nationality. The Court said:

"The meaning of domicile in Article 4 of the Nationality Law is determined by Article 1 of the Decree Law of November 12, 1938, which provides that minors must be authorised by the competent administrative authorities to reside in France. . . . On December 24, 1939, the date on which he came of age, d' Amico was detained in a reformatory at Aniane, and could not be regarded as domiciled in France in the meaning of the above law.

"Article 3 of the Nationality Law assimilates voluntary enlistment to the voluntary option provided for in that Article. It presupposes that the person concerned is under 21 . . . and satisfies the requirements of the above-mentioned Decree of November 12, 1938, concerning the control of aliens. . . . At the time of his voluntary enlistment d' Amico was over 20, and did not satisfy the requirements of the laws concerning the control of aliens. Accordingly, the performance of military service in France did not confer French nationality on him. During the period which d' Amico could have exercised the right of option conferred on him by the Law of August 28, 1927, he was uninterruptedly subject to *force majeure* which paralysed his free will and made it impossible for him either to acquire a regular domicile in France or voluntarily to enlist."

[Report: *Sirey, Jurisprudence,* 1952, II, p. 116.]

Nationality—Acquisition of—Compulsory Grant of Nationality—Grant by Order of Executive—Persons of "German origin" in Service of German Armed Forces—Grant of German Nationality by so-called Führer Order. **Case No. 61**

COMPULSORY GRANT OF GERMAN NATIONALITY CASE.

German Federal Republic, Court of Appeal of Neustadt.
October 29, 1951.

THE FACTS.—By a so-called Führer Order of May 19, 1943, the Chancellor of the German Reich purported to confer German nationality on all persons of "German origin" who were then serving in the German armed forces. The applicant, whose extradition had been requested by Austria and who was then in

Case No. 61 *Contd.* custody in Germany, was a person of German origin who had been serving in the German armed forces on the date referred to. He accordingly claimed that, as s. 16 of the German Extradition Law of December 23, 1929, prohibited the extradition of German nationals, he was not liable to be extradited to Austria. On behalf of the prosecution it was contended that the so-called Führer Order was invalid and incapable of conferring German nationality on the applicant, and that the request for the applicant's extradition must therefore be granted.

Held: that on the date when the so-called Führer Order was made, legislative power was vested in the Government and Parliament of the Reich, and not in the Chancellor, and that the Order purporting to confer German nationality on the applicant was therefore invalid; accordingly, the applicant was not a German national, and the request for his extradition must be granted. The Court said:

"The 'Führer Order' of May 19, 1943, cannot form the basis of acquisition of German nationality. It is true that according to Article I of this Order all foreign nationals of German origin serving in the German Wehrmacht automatically acquired German nationality upon the promulgation of this Order, but the Order itself was devoid of legal validity. According to the Law of March 24, 1933, as subsequently extended, only the Government . . . and the Reichstag (Parliament) were entitled to enact rules having the force of law. The Führer and Chancellor had no such right to enact legislation. . . . Having regard to the legal position as here outlined, there is no need to determine the question whether the applicant must be deemed to be an 'alien of German origin' within the meaning of the Order of May 19, 1943."

[Report: *NJW*, 5 (1952), p. 195.]

Case No. 62 **Nationality—Acquisition of Nationality by Marriage—Marriage to Austrian National while Austria Incorporated in German Reich—Acquisition of German Nationality—Subsequent Abandonment by Wife of Residence in Austria—Whether Wife Acquired Austrian Nationality on Reconstitution of Independent Austrian State.**

AUSTRIAN NATIONALITY CASE.

German Federal Republic, Federal Supreme Court.
October 4, 1951.

The Federal Supreme Court has laid down the following rules governing the nationality of women who contracted marriages with persons of Austrian origin while Austria formed part of the German Reich, *viz.* between March 13, 1938, and April 27, 1945:

(1) Austrian nationals acquired German nationality by virtue of the incorporation of Austria into the German Reich in 1938, and they retained that nationality at least until April 27, 1945, when Austria was reconstituted as an independent State.

(2) Accordingly, women who married former Austrian nationals between March 13, 1938, and April 27, 1945, acquired German nationality.

(3) The question whether a person who acquired Austrian nationality as from April 27, 1945, by virtue of the Austrian Transitional Nationality Act of July 10, 1945, thereby also lost his German nationality, must be determined, as a general rule, in accordance with German law.

(4) A wife who acquired German nationality by virtue of her marriage to a former Austrian national (*cf.* (2) *supra*) did not lose that nationality if she neither cohabited with her husband who reacquired Austrian nationality by virtue of the Austrian Transitional Nationality Act nor had any links with the Republic of Austria. The same rule applies in the event of the Austrian husband having lost his German nationality.

[Report: *JZ*, 6 (1951), p. 791.[1]]

Nationality—Acquisition of—On Change of Sovereignty—Cession—Nationality of Sudeten Germans—Effect of Czechoslovak Legislation of 1945. **Case No. 63**

NEDERLANDS BEHEERS-INSTITUUT *v.* NIMWEGEN AND MÄNNER.

Holland, District Court of Arnhem. January 17, 1952.
Court of Appeal of Arnhem. November 18, 1952.

THE FACTS.—Männer was at the time of the Münich Agreement of September 29, 1938, a Czechoslovak national, but under the German-Czechoslovak Treaty of November 20, 1938, he became a German subject. On October 31, 1941, he married Johanna van Nimwegen in Holland under the Dutch régime of " total community of property ". The marriage was dissolved by a decree of divorce of the District Court of Zutphen on November 14, 1946, and the property held in community was divided in equal shares by a notarial act of July 18, 1947. In October 1951 the couple remarried. The Nederlands Beheers-Instituut, which administered enemy property on

---

[1] The Higher Court of Appeal of Bavaria, in a judgment of March 21, 1952, laid down the following rules governing the nationality of children born between March 13, 1938, and April 27, 1945, of fathers who, while Austrians by origin, acquired German nationality by virtue of the incorporation of Austria in the German Reich:

(1) The children are German nationals by origin;
(2) Irrespective of their residence on the date of the restoration of the independence of Austria, they lost their German nationality and acquired Austrian nationality on that date.

NJW, 5 (1952), p. 788.]

Case No. 63 *Contd.* behalf of the State, claimed to be entitled to Männer's share in the estate, under the Royal Decree of 1944 (No. E 133) on Enemy Property.

Held (by the District Court) : that the claim must fail. Männer could not be regarded as having become an enemy subject. The Münich Pact of September 29, 1938, between Germany, Italy, Great Britain and France, which provided for the transfer by Czechoslovakia of part of her territory to Germany, was void under international law, since the four Powers purported to dispose of territory and subjects of a State which was not a party to that Agreement. The subsequent acceptance of this arrangement by Czechoslovakia made no difference, in the opinion of the Court, because it had been forced upon that State under the threat of aggression. The subsequent German-Czechoslovak Treaty of Berlin of November 20, 1938, for the implementation of the Münich Agreement, was similarly void under international law, on the same grounds, so that the imposition of German nationality upon Männer was invalid. Nor was the fact that Männer had been in the German military service relevant. His being called up for that service was equally illegal ; as he was a subject of Czechoslovakia, which was an ally of the Netherlands in their common war against Germany, only if he voluntarily entered the military service of Germany would he fall under the scope of the Decree on Enemy Property. The Beheers-Instituut had relied on the Constitutional Decree of the then President of the Czechoslovak Republic, of August 2, 1945 (No. 3), which provided that Czechoslovak citizens of German or Hungarian origin who had acquired German or Hungarian citizenship under legislative enactments of a foreign Occupying Power lost their Czechoslovak citizenship as at the date of that acquisition. The claimants sought to deduce from the Decree of 1945 that, quite apart from the conclusion to be reached on the problem of the validity or otherwise under international law of the Treaty of November 20, 1938, the German nationality thereby imposed upon Männer had been recognized after the war by the Czechoslovak Government. The Court could not, however, accept this view. The Presidential Decree of 1945 could not confer German citizenship upon Czechoslovak subjects—even supposing, for the sake of argument, that that was its intention, which does not appear to have been the case ; it could only declare that their Czechoslovak citizenship had lapsed. The effect of this Decree on Männer would be that (unless he could take advantage of the exception contained in Article 2 thereof) he became a stateless person. This was also the view of the Austrian Government and courts.[1]

---

[1] *Vide* Seidl-Hohenveldern, " Die Staatsbürgerschaft der Volksdeutschen ", in *Oesterreichische Zeitschrift für öffentliches Recht*, New Series, Part 2, pp. 305 *et seq.*, especially pp. 334 *et seq.*

The Beheers-Instituut appealed.

Held (by the Court of Appeal): that the judgment of the Court below must be reversed and that Männer was rightly regarded as an enemy subject. Apart from the controversial question whether there exists a positive rule of international law under which an agreement and a treaty such as those under consideration in this case must be held to be null and void because they were forced upon one of the parties—as a matter of fact, history shows that cessions of territory usually take place only under heavy pressure or after the use of force of arms—Czechoslovakia had in fact complied with the provisions of the Treaty of November 20, 1938. This must be taken into account by a court which has to decide the nationality of a Sudeten German. As to the Presidential Decree of 1945, this could not, it is true, grant German citizenship to an individual, but it nevertheless implied recognition and confirmation, at least indirectly, of the German-Czechoslovak Treaty of November 20, 1938, and of the attribution therein contained of German citizenship to the inhabitants of the part of Czechoslovak territory occupied by Germany.

[Reports: *N.J.*, 1952, No. 260, and *ibid.*, 1953, No. 438.]

Nationality—As Affected by Change of Sovereignty—Annexation—Incorporation of Latvia into the U.S.S.R.

See Case No. 20 (*Pulenciks* v. *Augustovskis*).

Nationality—As Affected by Change of Sovereignty—Cession.

See Case No. 135 (*In re Wolf*).

VI.—Expatriation. Loss of Nationality

Loss of Nationality—Person of Double Nationality—Loss of Nationality as the Result of Prolonged Residence in Country of Origin. **Case No. 64**

MANDOLI *v.* ACHESON.

United States, Court of Appeals, District of Columbia Circuit. January 10, 1952.

Supreme Court. November 24, 1952.

THE FACTS [from the opinion of the Supreme Court.]—" Petitioner Mandoli was born in this country, of unnaturalized Italian parents. These circumstances made him a citizen of the United States by virtue of our Constitution and a national of Italy by virtue of Italian law. While he was a suckling, his

Case No. 64 *Contd.* parents returned to Italy, taking him with them. At about the age of fifteen, he sought to come to the United States; but permission was refused by the American Consul at Palermo upon the ground that he was too young to take the journey unaccompanied.

" In 1931, Mandoli saw brief service in the Italian army. In 1937, being 29 or 30 years of age, he attempted to come to the United States, but was rejected because of such army service. He renewed the effort in 1944, with the same result. In 1948, he was granted a certificate of identity which permitted him to enter the United States for prosecution of an action to establish his citizenship.

" Judgment in the District Court [not reported] went against him on the ground that expatriation had resulted from two causes: first, contrary to his contentions, it found that his service in the Italian army was voluntary and that he then took an oath of allegiance to the King of Italy; second, that he continued to reside in Italy after attaining his majority, thereby electing between his dual citizenships in favor of that of Italy.

" The Government abandoned the first ground because the Attorney-General ruled that such service in the Italian army by one similarly situated could only be regarded as having been taken under legal compulsion amounting to duress. He said, ' The choice of taking the oath or violating the law was for a soldier in the army of Fascist Italy no choice at all '." (41 Opinions of the Attorney-General, Opinion No. 16).

Held (by the Court of Appeals): that the judgment of the Court below must be affirmed. The Court relied on a *dictum* in *Perkins* v. *Elg* (1939), 307 U.S. 325, 59 Sup. Ct. 884, 83 L. Ed. 1320 (see *Annual Digest*, 1938–1940, Case No. 116) that a child who is a United States citizen by birth and is taken during minority by his parents to their country of origin must promptly elect, upon attaining majority, to return to the United States or be deemed expatriated.

On appeal,

Held (by the Supreme Court, Douglas J., Vinson C.J., Reed and Clark JJ. dissenting): that the appeal must succeed. The Court said:

" This case presents but a single question, upon which petitioner and the Government are substantially agreed that the judgment of the Court of Appeals should be reversed. Does a United States citizen by birth who by foreign law derives from his parents citizenship of a foreign nation lose his United States citizenship by foreign residence long continued after attaining his majority? It would be as easy as it would be unrewarding to point out conflict in precept and confusion in practice on this side of the Atlantic, where ideas of nationality and expatriation were in ferment during the whole Nineteenth

Century. Reception of the common law confronted American courts with a doctrine that a national allegiance into which one was born could be renounced only with consent of his sovereign. European rulers, losing subjects (particularly seamen) to the New World, adhered fiercely to the old doctrine. On the other hand, the United States, prospering from the migrant's freedom of choice, became champion of the individual's right to expatriate himself, for which it contended in diplomacy and fought by land and by sea. However, this personal freedom of expatriation was not always recognized by our own courts, because of their deference to common-law precedent. Finally, Congress, by the Act of July 27, 1868, declared that ' the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness ' and that ' any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government.' (15 Stat. 223, 8 U.S.C. s. 800.)

" But this statute left unanswered many questions as to the overt acts that would effect a voluntary expatriation by our own citizens or would cause an involuntary forfeiture of citizenship. Prior to 1907, courts and administrators were left to devise their own answers.

" Preparatory to legislative action on the subject, Congress sought and received a report of a special citizenship board. Reviewing judicial decisions, this report concluded that the courts recognized well-established doctrines of election in cases dealing with rights of person [*sic*] with dual citizenship. This board recommended that Congress follow what it assumed to be established decisional law and enact, among other things, that expatriation be assumed as to any citizen who became domiciled in a foreign state, with a rebuttable presumption of foreign domicile from five years of residence in a foreign state. This was proposed as to all citizens and not merely those possessing dual citizenship. Congress, however, instead of accepting this broad doctrine of expatriation, by the Act of 1907 limited the presumption of expatriation from foreign residence to the case of naturalized but not of native-born citizens.

" If petitioner, when he became of full age in 1928, were under a statutory duty to make an election and to return to this country for permanent residence if he elected United States citizenship, that duty must result from the 1907 Act then applicable. In the light of the foregoing history, we can find no such obligation imposed by that Act ; indeed, it would appear that the proposal to impose that duty was deliberately rejected.

Case No. 64 *Contd.*

"The Court of Appeals, however, applied such a rule because it understood that this Court, in *Perkins* v. *Elg*, *supra*, had declared it to be the law. That case did not present and the Court could not properly have decided any question as to consequences of a failure to elect American citizenship . . . for the petitioner in that case did so elect."

The Court concluded :

"We find no warrant in the statutes for concluding that petitioner has suffered expatriation. And, since Congress has prescribed a law for this situation, we think the dignity of citizenship which the Constitution confers as a birthright upon every person born within its protection is not to be withdrawn or extinguished by the courts except pursuant to a clear statutory mandate. The judgment of the Court of Appeals should be reversed, with directions to remand the case to the District Court for the entry of an order declaring that the petitioner is a citizen of the United States."

Douglas J., dissenting with Vinson C.J., Reed and Clark JJ., stated that the record in the instant case showed that petitioner took an oath of allegiance to the King of Italy when inducted into the Italian army in 1931, and that this should result in expatriation in the absence of a further showing in the record that he did so under duress.

[Reports : 193 F. 2d 920 ; 344 U.S. 133, 73 Sup. Ct. 135, 97 L. Ed. 146.]

NOTE.—The decision of the Supreme Court is noted in *American Bar Association Journal*, 39 (1953), p. 144, and *Annual Survey of American Law*, 1953, p. 81.

Case No. 65

Nationality — Loss of — Naturalization — Re-Naturalization —*Force majeure*—Enemy Character of Property resulting from Enemy Naturalization of Owner.

In re REBHOLZ *ET UX.*

Holland, Council for the Restoration of Legal Rights (Judicial Division),[1] *Amsterdam. January* 22, 1951.

THE FACTS.—Rebholz, a German national by birth, was naturalized in the Netherlands on December 30, 1932. During the German occupation of Holland he and his wife again became Germans, through *Rückbürgerung* (re-naturalization) on March 6, 1943. They consequently lost their Netherlands nationality under Article 7 of the Dutch Law on Citizenship of 1892. But on June 5, 1943, an Emergency Decree (*Staatsblad* No. D 16) was enacted by the Netherlands Government in London which provided that Netherlands subjects who had become German citizens during the war would nevertheless, as an exception from the general rule of the said Article 7, retain their Netherlands citizenship. (The intention of this provision was to prevent such persons from escaping punishment in Holland for any treacherous behaviour during the war.) Thus, from that date Rebholz and his wife were possessed of dual nationality. Under a later Decree of October 20, 1944 (No. E 133), their property became enemy property and as such liable to appropriation by the State of the Netherlands for the purposes of reparations. Rebholz and his wife claimed to be relieved from the effects of this measure on the grounds (*a*) that the Decree on Enemy Property was intended to apply only to those German nationals who did not possess at the same time Netherlands nationality, and (*b*) that in any case they had been re-naturalized through *force majeure* and therefore their German citizenship should not be regarded as a ground for the appropriation of their property.

---

[1] See *Annual Digest*, 1947, p. 253.

Held: that the claims must be dismissed and the claimants deemed to be German for the purpose of Decree No. E 133. With regard to the first ground of appeal, the Decree contained no such restriction as was contended for by the plaintiffs. It provided that certain legal disabilities should result from the fact of a person having been an enemy subject during the war, regardless of whether he was or was not at the same time a Netherlands citizen. As to the second ground of appeal, the Court declined to deal with the question whether the defence of *force majeure* could be pleaded in answer to a charge based on a naturalization, for whatever reason the latter might have been applied for or granted. In any event, in this case there had been no *force majeure* in the accepted sense. The claimants maintained that financial disaster and other dangers would have befallen them if they had preserved their Netherlands nationality. This mere possibility did not constitute *force majeure*. Many people in those days had run the risk of losing their lives or their property. Those who chose German naturalization as a means of escaping such risks had to bear the consequences of their choice. The claimants had also alleged that the *Wiedereinbürgerungsgesetz* had been declared in Germany to be invalid. Even if this were true, the German Legislature could not *a posteriori* wipe out the fact that the plaintiffs had allowed themselves during the war to be re-naturalized as German subjects.

[Report: *Rechtsherstel*, 1951, No. 17.]

Case No. 66

Nationality—Loss of—Dual Nationality—Naturalization.

In re REYLING.

Holland, Council for the Restoration of Legal Rights (Judicial Division),[1] *The Hague. February* 7, 1951.

THE FACTS.—The claimant was the widow of a Netherlands subject who was domiciled in Holland. During the German occupation of the Netherlands her husband had applied for and obtained German nationality (whereby she also became a German national). The husband died in Berlin in December 1943. After the war his property and that of his widow was appropriated by the State of the Netherlands, as enemy property, under the Decree of October 20, 1944 (No. E 133) (see *In re Rebholz et Ux.*, Case No. 65 in this volume). The widow claimed to be relieved of the effects of that measure on the ground that in cases of dual nationality the Netherlands courts should, according to the general principles of Dutch private international law, make a choice between the two nationalities concerned, and that on that assumption she must be regarded as a Netherlands national because of her own personal feelings and conduct during the war, and because of the fact that her husband had applied for German nationality without her knowledge.

Held: that the application must fail; all the property in question was rightfully taken as enemy property. Even if it were correct that according to Dutch private international law a Netherlands court was competent in cases of dual or plural nationality to determine which of the two or more nationalities must prevail, it did not have such a power of choosing in cases like the present, where the construction of a legal provision of a wholly general nature was involved. The Decree of October 20, 1944, made no distinction between persons who did and those who did not possess, besides their enemy citizenship, any other nationality, whether neutral or allied or, for that matter, Netherlands nationality. Had Decree No. E 133 been intended to make such a distinction, it would certainly have contained an express provision to that effect. (The Court here referred to Decree No. D 16—see *In re Rebholz et Ux., ubi sup.*)

[Report: *Rechtsherstel,* 1951, No. 140.]

---

[1] See *Annual Digest,* 1947, p. 253.

Nationality—Loss of—On Change of Sovereignty—Cession—Nationality of Sudeten Germans in 1938. **Case No. 67**

In re BARONESS VON SCHARBERG.

Holland, Council for the Restoration of Legal Rights (Judicial Division), The Hague. August 30, 1951.
(Chamber of Judges: Block, Zorab, Versteeg.)

THE FACTS.—The applicant was the widow of one Pahler, who was born in the Sudetenland and became a Czechoslovak subject in 1920. In June 1938, that is, shortly before the Munich Agreement of September 29, 1938, and the German-Czechoslovak Treaty of November 20, 1938, Pahler and the applicant went to reside in the Netherlands, where they had their names enrolled with the Dutch authorities as Czech nationals, and where Pahler died a year later. The applicant remained and had ever since resided in Holland. After the war the applicant's property and that which had belonged to Pahler was appropriated by the State under the Decree on Enemy Property of October 20, 1944 (*Staatsblad*, No. E 133) as enemy property. The applicant applied for restitution of the property.

Held: that the application must be dismissed. Both the applicant and her former husband had become enemy subjects at the outbreak of the war. Their Czechoslovak nationality had come to an end as the result of the German "*Reichsgesetz über die Wiedervereinigung der sudetendeutschen Gebiete mit dem Deutschen Reiche*" of November 21, 1938, under which they became German subjects. This was subsequently confirmed by the Presidential Decree of August 2, 1945 (No. 33), regarding the Czechoslovak citizenship of individuals of German or Hungarian nationality. Article 1, paragraph 1, of this Decree clearly rejected the validity of the *Reichsgesetz*, since it laid down that Czechoslovak subjects of German origin who had acquired German citizenship under legislative enactments of a foreign Occupying Power (such as the *Reichsgesetz*), were held to have lost their Czechoslovak citizenship at the same time. Paragraphs 3 and 4 of Article 1 and paragraph 1 of Article 2 of the Decree of 1945 contained exceptions in favour of, *e.g.*, those who had registered themselves as Czechoslovak subjects. Pahler had in fact done this in the summer of 1938, but with Netherlands authorities. This could not, however, be regarded as registration within the meaning of Article 1, paragraph 3, of the Presidential Decree, which clearly had in view registration with Czechoslovak authorities either in Czechoslovakia or abroad. It could not be assumed that in a matter so complicated as the distinction between citizens in the legal sense and nationals in the ethnical sense the Decree should

Case No. 67 *Contd.*

have intended to leave the decision to authorities other than Czechoslovak.

[Report: *Rechtsherstel*, 1951, No. 113.]

Case No. 68

Nationality—Loss of—On Change of Sovereignty—Annexation —German Seizure of Danzig—Non-recognition of Seizure by United States and Great Britain—Effect of—Right of State to Denationalize Resident Aliens—Universal Declaration of Human Rights, 1948.

In re Krüger.

Holland, Council for the Restoration of Legal Rights (Judicial Division), The Hague. September 13, 1951.

(Chamber of Judges: Scholten, van Walsen and Wery.)

The Facts.—Clara Krüger, a former citizen of the Free City of Danzig, applied to the Judicial Division of the Council for the Restoration of Legal Rights for an order for the restitution of her property which had been appropriated as enemy property by the State of the Netherlands under the Royal Emergency Decree of October 20, 1944 (No. E 133).

Held: that the application must succeed. The applicant had never become a German (enemy) subject, and her property must therefore be restored to her. The legal status of the Free City of Danzig was based on Articles 100–108 of the Treaty of Versailles, 1919. Article 105 of the Treaty gave Danzig citizens a nationality of their own. The Free City was to be regarded as an international person and a State, albeit a non-sovereign State (see the Advisory Opinion of the Permanent Court of International Justice of February 4, 1932: *P.C.I.J.*, Series A/B, No. 44, pp. 23–24 [1]). The Netherlands Beheers-Instituut [an organization entrusted with the administration of enemy property on behalf of the Kingdom of the Netherlands] claimed that the Free City had ceased to exist in law as a State and an international person as a result of the enactment, on September 1, 1939, by Robert Forster, the then Gauleiter of the Free City, of the "*Gesetz über die Wiedervereinigung der Freien Stadt mit dem Deutschen Reich*". Under this Decree, the Constitution of Danzig was cancelled forthwith, its territory was declared to be part of the German Reich, and the nationals of the former Free City were declared thenceforth to be German nationals, in accordance with provisions to be published later. The German authorities had tried, it is true, to give these proceedings the appearance of a voluntary accession of Danzig to the German Reich, but in actual fact they amounted to an arbitrary annexation, brought about by forcible means and accompanied by the complete setting aside of existing Danzig legislation and the international Statute of the Free City. These proceedings must be looked at in the context of the German-Polish war which broke out on the same day, September 1, 1939, and were in essence nothing more than the military occupation of Danzig by Germany. Such an occupation did not under international law justify the annexation of the occupied territory so long as hostilities between the Occupying Power and its adversaries continued and there was still a possibility of the restoration of the *status quo ante bellum.* The annexation had not been recognized after the war by the Western Allies, in particular the United Kingdom and the United States of America; on the contrary, the continued legal existence of Danzig as an international entity had expressly been admitted.[1] Thus, for example, the British Foreign Secretary declared in the House of Commons on October 11, 1945, that in the view of the British Government the legal situation of Danzig remained unchanged and would remain so until the conclusion of a peace treaty. Consequently, no person who had possessed Danzig nationality prior to September 1, 1939, lost that nationality as a result of the German annexation law. This was true not only for those who at that time lived outside Germany, but also for those who were then domiciled inside Germany.

---

[1] *Treatment of Polish Nationals, etc., in the Danzig Territory*: see *Annual Digest*, 1931–1932, Case No. 104.

The proposition that the question whether a person is the national of a particular State is determined exclusively by the legislation of that State is, as a general rule, incorrect. No State is competent or in a position *propria auctoritate* to deprive of their citizenship aliens who are resident on its territory (*vide* the Universal Declaration of Human Rights of 1948, Article 15, paragraph 2). There was no need for the Court to enter into an additional examination of subsequent juridical acts relating to Danzig, such as the entrusting by the Potsdam Conference of the provisional administration of Danzig to Poland, followed by its annexation by Poland and the recognition of that annexation by the Soviet Union. The most that could be deduced from those events was that former Danzig nationals who resided outside Danzig had thereby become stateless. Even on that basis, however, the Decree of 1944 on enemy subjects could not be held to apply to them.

[Report: *Rechtsherstel*, 1951, No. 108.]

NOTE.—For a decision to the contrary see *In re Nix et Al.* (*infra*, Case No. 69) and the Note thereto.

---

[1] *Vide* Menzel, "Zur Frage der Danziger Staatsangehörigkeit", in *Jahrbuch für internationales und öffentliches Recht*, 1948–1949, p. 886.

Case No. 69

Nationality—Loss of—On Change of Sovereignty—Annexation—German Seizure of Danzig—Absence of International Recognition—Effect of—Potsdam Agreement, 1945.

In re NIX *ET AL.*

Holland, Council for the Restoration of Legal Rights (Judicial Division), The Hague. September 14, 1951.
(Chamber of Judges: Zorab, ter Pelkwijk and Versteeg.)

THE FACTS.—This was an application by a number of former citizens of Danzig for a restitution order in respect of their property which had been appropriated by the State in circumstances similar to those in *In re Krüger* (*supra*, Case No. 68). Nix, the principal applicant, contended in support of his claim that he ought not to be treated as an enemy subject; that (*a*) the merger on September 1, 1939, of Danzig into the German Reich was contrary to the Constitution of Danzig and, therefore, illegal under international law; (*b*) it was equally contrary to existing treaties and, therefore, void under international law; (*c*) in any case, the applicant had never taken any initiative to have himself inscribed in the German *Volksliste* and could, therefore, at the worst, be held to have become a stateless person.

Held: that the application must fail. The applicants had since September 1, 1939, become German subjects.[1]

The Court proceeded to analyse the successive Decrees and other steps taken to incorporate the territory of the Free City and its citizens in the German Reich and people. These consisted of: appointment of Gauleiter Forster as " Head of State " of Danzig, on August 24, 1939; *Erlass* (Decree) dated September 1, 1939, of that Head of State annulling the Danzig Constitution, concentrating all legislative and executive powers in himself, and merging the territory into the German Reich, but provisionally maintaining in force all other Danzig legislation; enactment of a *Gesetz* (statute) dated September 1, 1939, by the German Reichstag " *über die Wiedervereinigung der Stadt Danzig mit dem Deutschen Reich* " (" Concerning the Reunification of the City of Danzig with the German Reich ") (*Reichsgesetzblatt*, 1939, p. 1547), declaring Forster's *Erlass* to be a law of the Reich and that Danzig citizens would become German nationals in conformity with rules subsequently to be enacted; Decree dated October 8, 1939, of Hitler, constituting the territory of Danzig a Regierungsbezirk of the Reichsgau of Western Prussia under a Reichsstatthalter, and further providing for the imposition of *Reichsbürgerschaft* (German citizenship) on Volksdeutsche (Germans abroad); detailed regulations between

---

[1] See *supra*, Case No. 68 (*In re Krüger*).

March 4, 1941, and January 31, 1942, for the registration on the *deutsche Volksliste*, as Germans, of former Danzig citizens.

The Court continued: "On September 1, 1939, Gauleiter Forster committed, it is true, a revolutionary act, contrary not only to Article 4 of the Danzig Constitution but also to the rights of the League of Nations and of Poland. Nevertheless, it could not be denied that as a result of that act the Free City, which was until then a State within the meaning of public international law, had lost its character of a State and had resolved itself into an administrative part of the German Reich by a *de facto* accession. Such an accession or incorporation is a method of putting an end to the existence of a State which is recognised by the law of nations, whether it is effected by forcible means, or voluntarily or pseudo-voluntarily, *e.g.* by the acts of internal dissidents, etc. The legal situation would be different if it could be held that the object of an annexation was the territory of a State with which the annexing State was at war, since such an annexation of enemy territory during a war is generally considered illegal and void (as was the case, for example, with the annexation by Germany of Belgian Eupen and Malmédy and of Polish Silesia in the Second World War). Danzig could not, however, be regarded as having been Polish territory, in spite of the special position which Poland held with respect to the Free City, and did not, therefore, come under the description of enemy territory."

As far as the absence of international recognition of the annexation was concerned, the Court held that the validity of an annexation did not depend upon its express recognition by a State not directly interested, and still less upon its general recognition internationally. A State whose rights were violated by an annexation could certainly protest against it by declaring that it did not recognize the annexation, but such a declaration had not been made by the Netherlands Government, nor, if it had been made, would it have undone the fact of the annexation. The Court continued: "Moreover, there has been no question of any revival, after the unconditional surrender of Germany, of Danzig as a State, as there had been with Czechoslovakia and Austria. On the contrary, it can be concluded from the Potsdam Agreement of August 2, 1945, that no revival of Danzig is contemplated by the victors (*vide* Chapter IX concerning Poland: 'Pending the final determination of Poland's western frontier, the former German territories east of . . . including the area of the former Free City of Danzig, shall be under the administration of the Polish State'). Under these conditions it would be unrealistic to admit the continuing legal existence of Danzig as a Free City, or under any other form of separate juridical entity, especially as no trace of independent government, which is essential for the existence of a State, is evident. On this assumption of the annihilation of Danzig as an international person and its annexation to Germany, its citizens can only be regarded either as having automatically on that annexation acquired the status of nationals of the annexing State, or as having provisionally become stateless until the annexing State made the necessary provisions regarding their status, which was in fact done in respect of the population of Danzig."

[Report : *Rechtsherstel*, 1951, No. 110.]

NOTE.—Owing to the large number of applications for restitution of property received in 1950 from former Danzig citizens, the cases were referred for decision to two different Chambers of the Judicial Division of the Council. As will be seen from a comparison of *In re Krüger* and *In re Nix et Al.*, the two Chambers reached different conclusions on the problem of the nationality of former Danzig nationals. The emergency legislation which set up the Council for the Restoration of Legal Rights did not provide for any form of appeal, and the Supreme Court had no jurisdiction in this particular matter to ensure uniformity of judicial decisions. Thus on two consecutive dates two Chambers of the same Court rendered contrary decisions without there being any possibility of redress. (Something of the same kind happened in respect of the Emergency Decree on Occupation Measures of September 17, 1944 (No. E 93), between the Supreme Court and the Special Court of Cassation : *cf. Vakgroep Begrafeniswegen* v. *H.M.C.T.*, Case No. 184 in this volume, and Note.) There was a special Chamber of Revision, which, however, could only take cognizance of cases in which one of the parties alleged " new facts ". At a later stage, a special Chamber of Appeal of five Judges was set up. This Chamber, however, did not give its judgment until 1956. (It is hoped to report this decision in a future volume of the *International Law Reports*.)

Nationality—Loss of—Proof of—Burden of Proof.

KÜHN *v.* CUSTODIAN OF ENEMY PROPERTY.

Norway, Supreme Court. September 8, 1951.

THE FACTS.—Kühn was born in Germany, where he performed his military service from 1908 to 1910. He settled in Norway in 1911 and started a bakery business. He was on the point of marrying a Norwegian woman in 1914 when the First World War started. He refused to return to Germany and did not participate in the war—a fact which according to German law involved loss of German nationality. He had since been refused a German passport. After the Second World War he was treated as a German, and his assets were taken over by the Custodian on the ground that he was an enemy alien. He claimed that the sequestration was illegal because he was stateless, even though he could not prove that he had definitely lost his German nationality, partly owing to technical difficulties in obtaining the relevant documents in Germany after the end of hostilities.

Held (by Judge Thrap for a unanimous Court): that the probability that a decree for loss of German nationality had been issued was so great that the Court could not with safety base a decision on the assumption that Kühn on May 9, 1945, was a German national.

[Report: *Rt.*, 1951, p. 757.]

NOTE.—Under the Norwegian Statute on enemy property of March 22, 1946, a person can be declared an enemy alien if he has assisted the enemy, even though he is not technically a national of the country in question. The Custodian maintained that Kühn was in this category. However, the Court held that this could not legally be the case since, in a criminal action, he had been acquitted of all incriminating facts except having given a contribution to the German *Winterhilfe* collection.

Nationality—Proof of—Burden of Proof—Acquisition of Enemy Nationality—Loss of Citizenship. **Case No. 71**

CUSTODIAN OF ENEMY PROPERTY *v.* GRÜNERT.

Norway, Supreme Court. September 8, 1951.

THE FACTS.—Carl and Käte Grünert, of German ancestry, obtained Norwegian citizenship by naturalization on July 31, 1932. During the Second World War and the German occupation of Norway Grünert worked for the German interests. On December 11, 1943, the German Reichskommissar informed the Ministry of Justice that the Grünerts had reacquired German nationality. After the war they were both condemned as traitors, he to hard labour for 18 months and confiscation of 40,000 kroner and she to a fine of 5,000 kroner. The Custodian of Enemy Property treated them as enemy aliens and sequestered their property. According to Norwegian law, a person, even if he is not of Norwegian nationality, may be punished as a traitor if he is domiciled in Norway.

According to the Norwegian Nationality Law of 1924, which was in force in 1943, a Norwegian citizen lost his nationality if he acquired a foreign nationality. However, if he were domiciled in Norway, the loss would not take place until he had left the country. A new Law was passed on December 13, 1946, to the effect that persons who had acquired enemy nationality after the war broke out, could lose their (Norwegian) nationality even without leaving the country. This statute affected only those persons who had themselves taken steps to acquire the nationality concerned. The question in the present case was, therefore, whether the Grünerts had taken any steps to obtain

Case No. 71 *Contd.* German nationality. The Court of Appeal found that they had simply lost their Norwegian nationality.

Held (by Judge Gaarder, for a Court divided by 3 to 2): that the decision of the Court of Appeal must be reversed. The Custodian of Enemy Property had not proved that Grünert had taken any steps to acquire German nationality. Since the burden of proof must be on him, the appeal failed. Grünert had not lost his Norwegian nationality and his property must be restored to him.

The two dissenting Judges found that it had been proved that Grünert had taken active steps to reacquire his previous German nationality.

[Report: *Rt.*, 1951, p. 751.]

Case No. 72 **Nationality—Loss of—Voluntary Transfer to Enemy Territory—Resident of Israel—Refusal of Israel Authorities to Issue Resident's Identity Card.**

In *Badawi* v. *Military Governor, Galilee,* decided by the Israel Supreme Court sitting as the High Court of Justice on August 10, 1951, it was *held* that an order *nisi* would not issue to a petitioner resident in Nazareth who, when the City was occupied by the Israel Defence Forces, fled and left the City for several months, voluntarily residing during that time in enemy territory. Badawi had left Israel territory without permission while the fighting was in progress and before the General Armistice Agreements between Israel and the Arab States had been signed and entered into force; returning later also without permission. In such circumstances the Court would not order the appropriate authority in Israel to recognize the petitioner as a legal resident of Israel and to issue him with an identity card.

[Report: *Piskei-Din*, 5 (1951), p. 1241.]

Note.—Followed in *Ahmed* v. *Military Governor, Galilee,* decided on November 8, 1951 [*ibid.*, p. 1386]. Distinguished in *Hamud et Al.* v. *Minister of the Interior,* decided on December 24, 1951, where the Supreme Court declined to apply this doctrine where it was not established that the petitioners had left the country, and crossed into enemy lines, of their own free will [*ibid.*, p. 1641]. In *Khalidi* v. *Minister of the Interior,* decided on January 10, 1952, relief was granted to a petitioner who had left his place of residence and joined the enemy before May 15, 1948, the date of the establishment of Israel, for he could not be considered as having left Israel illegally [*Piskei-Din,* 6 (1952), p. 52].

Nationality—Loss of Nationality Acquired under Treaty—Whether Affected by Abrogation of Treaty on Outbreak of War.

See Case No. 156 (*In re Barrabini*).

VIII.—Double Nationality

Dual Nationality—Allegiance—Treason—Loss of Nationality—The Law of the United States of America. **Case No. 73**

KAWAKITA *v.* UNITED STATES.

United States, District Court, Southern District, California. November 1, 1950.

Court of Appeals, Ninth Circuit. June 22, 1951.

Supreme Court. June 22, 1952.

THE FACTS.—Petitioner, a national both of the United States and of Japan, was indicted for treason, the overt acts relating to his treatment of American prisoners of war. He defended at his trial on the ground that he had renounced or abandoned his United States citizenship and was expatriated so that his duty of allegiance had ceased before the commission of the acts charged. He had acquired United States citizenship by his birth in that country to parents of Japanese nationality, through whom he had acquired Japanese citizenship as well. He took an oath of allegiance in 1939 when he applied for a United States passport in order to go to Japan, and in 1940 he registered with an American consul in Japan as an American citizen. In 1941 he renewed his American passport in Japan and during this period he was registered with the Japanese police as an alien. The following year he became of age. When war broke out he was a student at a Japanese university, and by the time he had completed his schooling in 1943 it was impossible for him to return to the United States. He then registered in the *Koseki* (family census register). He accepted labour draft papers and was employed by a mining company as an interpreter with an American prisoner-of-war detachment assigned to that company. The treasonable acts for which he was convicted involved atrocities against the prisoners of war. During this time petitioner visited China on a Japanese passport, and each morning faced the east and paid his respects to the Emperor of Japan.

After the end of the war petitioner applied to a United States consul for registration as an American citizen, stating under oath that he was a United States citizen and had not done various acts amounting to expatriation. He was issued with a passport and returned to the United States, where he was

Case No. 73 *Contd.*

recognized by a former prisoner of war, arrested, and indicted.

The Court instructed the jury that if they found that petitioner had lost his American citizenship prior to or during the period specified in the indictment, they must acquit him even if he did commit the overt acts charged in the indictment, since his duty of allegiance would have ceased with the termination of his American citizenship ; that if the jury should find beyond reasonable doubt that during the period in question petitioner was an American citizen, he owed the United States the same duty of allegiance as any other citizen ; and that even though the jury found that petitioner was an American citizen during the period in question, they must acquit him if at the time of the overt acts petitioner honestly believed he was no longer a citizen of the United States, for then he could not have committed the overt acts with treasonable intent. The special verdicts of the jury contained, with respect to each overt act as to which petitioner was found guilty, an affirmative answer to an interrogatory that he was at that time " an American citizen owing allegiance to the United States, as charged in the indictment ".

Held (by the District Court) : that judgment must be given against the petitioner. " The defendant was lawfully and fairly indicted, tried and convicted. There appears no basis in fact or law to acquit, arrest the judgment, or order another trial." He was sentenced to death.

On appeal,

Held (by the Court of Appeals) : that the judgment must be affirmed. The accused, not having been expatriated, owed allegiance to the United States. He had, with treasonable intent, given aid and comfort to the enemy. The Court said :

" The definition of treason is a part of the supreme law of the land. United States Constitution, Article III, Sec. 3, provides : ' Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. . . .'

" Title 18 U.S.C.A. § 1, Act of March 4, 1909, c. 321, § 1, 35 Stat. 1088, as it stood at the time of the alleged overt acts, provided : [1] ' Whoever, *owing allegiance to the United States*, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.' [Emphasis ours.]

" By definition, the crime of treason can only be committed by one owing allegiance to the United States. It is appellant's contention that at the time the acts charged in the indictment were committed, he did not owe allegiance to the United States

---

" [1] See new Title 18 U.S.C.A. § 2381, Act of June 25, 1948, c. 645, 62 Stat. 807."

because, as a dual American and Japanese citizen, he owed allegiance to Japan alone while in that country. According to appellant's reasoning, in his brief, under his dual citizenship he could adhere to the enemy and give it aid and comfort while in the enemy country with impunity. As we shall presently show, dual citizenship does nothing to relieve an American citizen of his citizenship obligations. An American citizen retains that status until expatriated under American law and he is subject to trial and punishment for treason. It is also contended that, having been a Japanese national from birth, Kawakita's act of registration in the family census register, and his other activities during the war, amounted to expatriation from United States citizenship.

" Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. *Perkins* v. *Elg*, 1939, 307 U.S. 325, 59 S.Ct. 884, 83 L. Ed. 1320. In order to be relieved of the duties of allegiance, consent of the sovereign is required. *Mackenzie* v. *Hare*, 1915, 239 U.S. 299, 36 S.Ct. 106, 60 L. Ed. 297. Congress has provided that the right of expatriation is a natural and inherent right of all people,[1] and has further made a legislative declaration as to what acts shall amount to an exercise of such right. The enumerated methods set out in the chapter are expressly made the sole means of expatriation.[2]

" The jury was instructed on the applicable law of expatriation and that if appellant were no longer a citizen of the United States he could not be found guilty of treason. The court went further and instructed the jury that if it found appellant believed he was not a United States citizen it should acquit as intent would then be lacking. The verdict indicates that all of these issues were resolved against appellant.

" The contention that a conviction of treason must be reversed because the accused did not owe allegiance to the United States was made in *Gillars* v. *United States*, D.C.Cir., 1950, 182 F. 2d 962. There, defendant was convicted of treason against the United States, committed while in Germany during

" [1] Title 8 U.S.C.A. § 800 : ' Right of expatriation

' Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness ; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship ; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof ; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed : Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.' "

" [2] Title 8 U.S.C.A. § 808 : ' Exclusiveness of means of losing nationality

' The loss of nationality under this chapter shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this chapter.' "

Case No. 73 *Contd.* World War II, for conduct consisting of taking part in psychological warfare against the United States through participating in the recording of radio drama. The argument was advanced, inter alia, that defendant had signed an oath or affirmation of allegiance to Germany, and that this brought about a dissolution of her citizenship and allegiance to the United States. It was held that the trial court did not err in instructing the jury that the statement being vague and informal, it did not come within the purview of Section 401 of the Nationality Act of 1940, Title 8 U.S.C.A. § 801 (b).

" Litigation on questions of expatriation usually occur in a different setting. The ' citizen ' is usually seeking to assert that his citizenship was *not* lost by some act which is alleged to amount to expatriation. In *Mackenzie* v. *Hare, supra,* plaintiff in error contended that an act of Congress which provided that any American woman who married a foreigner should take the nationality of her husband, did not operate to deprive her of her United States citizenship on marriage to a subject of Great Britain since, if so intended, it was beyond the authority of Congress. The Supreme Court there stated that it should hesitate long before limiting or embarrassing such an attribute of sovereignty. While it was conceded that a change in citizenship could not be arbitrarily imposed, without the concurrence of the citizen, it was held that the law in question did not have that feature, since it dealt with a condition voluntarily entered into.

" In *Perkins* v. *Elg, supra,* Marie Elizabeth Elg, who was born in the United States of parents who were natives of Sweden, was taken by her mother to Sweden while still a minor. Shortly after attaining majority, she returned to the United States on an American passport, and was admitted as a citizen. Later, on being threatened with deportation, she sought a declaratory judgment to establish United States citizenship. In holding that United States citizenship was not lost, the Supreme Court stated 307 U.S. at page 329, 59 S.Ct. at page 887, 83 L. Ed. 1320 : '. . . As municipal law determines how citizenship may be acquired, if follows that persons may have a dual nationality. And the mere fact that the plaintiff may have acquired Swedish citizenship by virtue of the operation of Swedish law, on the resumption of that citizenship by her parents, does not compel the conclusion that she has lost her own citizenship acquired under our law. As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles. . . .'

" This quotation indicates three ways by which, at the time it was written, expatriation or loss of citizenship could occur : (1) through operation of a treaty ; (2) through congressional enactment ; (3) through voluntary action in conformity with applicable legal principles.

" It is not contended nor are we aware of any treaty between Japan and the United States which would have application to this particular issue. See Title 8 U.S.C.A. § 810. The reference to a third means of expatriation is foreclosed by the provision in the Nationality Act of 1940, enacted since *Perkins* v. *Elg* was written, providing that the means therein provided shall be exclusive. See Title 8 U.S.C.A. § 808, set out in [n. 2, p. 267] *supra*. Thus, Kawakita's alleged loss of United States citizenship could only be claimed by virtue of some free and voluntary act on his part which, by the Congressional Act, would be ground for expatriation.

" In *Savorgnam* v. *United States*, 1950, 338 U.S. 491, 70 S.Ct. 292, 94 L. Ed. 287 [*Annual Digest*, 1949, Case No. 59], it was held that a native born American citizen who *voluntarily* obtained Italian citizenship through naturalization in accordance with Italian law, had expatriated herself under the laws of the United States, but acts which would seemingly expatriate under the Nationality Act of 1940 have been held not to have such effect where the element of duress or lack of free choice existed. In *Acheson* v. *Murakami*, 9 Cir., 1949, 176 F. 2d 953, we upheld a judgment cancelling the renunciation of citizenship by American born persons of Japanese descent, made while they were incarcerated pursuant to civilian exclusion orders issued during World War II. See *Kiyoshi Hirabayashi* v. *United States*, 1942, 320 U.S. 81, 63 S.Ct. 1375, 87 L. Ed. 1774. The renunciations not being given as a result of free and intelligent choice, but rather because of mental fear, intimidation and coercion, they were held void and of no effect. See *Attorney General of the United States* v. *Ricketts*, 9 Cir., 1947, 165 F. 2d 193.

" Voting in a Japanese election, and service in the Japanese army, acts falling within paragraphs (*c*) and (*e*) of Section 401 of the Nationality Act of 1940,[1] have been held not to expatriate where the acts were done under duress. *Hatsuye Ouye* v. *Acheson*, D.C.Hawaii, 1950, 91 F. Supp. 129 ; *Etsuko Arikawa* v. *Acheson*, D.C.Cal. 1949, 83 F. Supp. 473 ; *Yoshiro Shibata* v. *Acheson*, D.C.Cal. 1949, 86 F. Supp. 1 ; see *In re Gogal*, D.C.Penn. 1947, 75 F. Supp. 268.

" Meiji Fujizawa, who testified at the appellant's trial, was a childhood friend of the appellant. Though his case closely parallels Kawakita's in some instances there are differences. Fujizawa was born in Imperial County, California, of parents who were born in Japan, and following his graduation from high school in 1939, went to Japan to further his education. Prior to leaving the United States he officially renounced his Japanese nationality. He, like Kawakita, attended Meiji

---

" [1] Title 8 U.S.C.A. § 801.

Case No. 73 *Contd.*

University and graduated in September, 1943. When the war came on, funds from his parents in the United States ceased and he was required to find employment. He was informed that he could secure no employment unless he recovered his Japanese nationality. He made application for such recovery and upon its being granted, had his name entered upon the Family Register. He then procured employment as an interpreter at the Oeyama Nickel Industry Company, Ltd., where he remained until VJ day. Unlike Kawakita, it appears that Fujizawa assisted the American prisoners in many ways by obtaining for them medical supplies and food.

" In 1947 Fujizawa applied to the United States consulate in Japan to be reinstated as a United States citizen, and his application being denied, he brought an action in the United States district court to establish his claim to United States citizenship. The government contended that Fujizawa lost his United States citizenship since his petition for restoration of Japanese citizenship was '. . . Obtaining naturalization in a foreign state . . . ', within the meaning of Section 801(a), of Title 8 U.S.C.A. The district court, stressing the principle that acts on their faces tending toward expatriation must be free and voluntary, held that Fujizawa had no intent to renounce his United States citizenship. *Meiji Fujizawa* v. *Acheson*, D.C.Cal.1949, 85 F. Supp. 674. There was no appeal. There is nothing in the *Fujizawa* case which supports the theory that Kawakita's act of entering his name on the Family Register accomplished his expatriation. The evidence is quite clear that he had no thought that it did either when he acted to have his name entered or afterwards. In leaving the country of his birth, Kawakita's purpose was to visit his aged grandfather in Japan. There he remained to prepare himself for the export-import business in the United States. After entering the University in Japan, he again swore allegiance to the United States when he renewed his United States passport in 1941, and claimed citizenship in the United States when the war was over.

" We hold that there was evidence in the case justifying the jury finding that Kawakita was a citizen of the United States owing allegiance to the United States during the period in suit.[1]

. . . . . .

" Kawakita is not charged with levying war against the United States. The acts found to have been committed are said to be acts showing adherence to the enemy, giving them aid and comfort.

" In *Cramer* v. *United States*, 1944, 325 U.S. 1, at page 28, 65 S.Ct. 918, 932, 89 L. Ed. 1441, the court stated : ' Treason of adherence to an enemy was old in the law. It consisted of breaking allegiance to one's own king by forming an attachment to his enemy. Its scope was comprehensive, its requirements indeterminate. It might be predicated on intellectual or emotional sympathy with the foe, or merely lack of zeal in the cause of one's own country. That was not the kind of disloyalty the framers thought should constitute treason. They promptly accepted the proposal to restrict it to cases where also there was conduct which was " giving them aid and comfort ". . . .

---

[1] [Footnote omitted.]

" ' Thus the crime of treason consists of two elements: adherence to the enemy ; and rendering him aid and comfort. A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason. On the other hand, a citizen may take actions which do aid and comfort the enemy —making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength—but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason.'

" Intent to adhere to the enemy is required in treason. This element of the crime, since it concerns state of mind, is not subject to the two-witness requirement. *Cramer* v. *United States*, *supra* 325 U.S. at page 31, 65 S.Ct. at page 933. Where the overt act charged is of an equivocal or innocent nature in itself, as in the Cramer and Haupt [1] cases, other compelling evidence is required in order to make out the intent to betray. Where, however, as here, the acts found to have been committed are themselves of such a nature as to give rise to strong inferences of a disloyal state of mind, the problem is less difficult. And there is, in addition, the testimony of witnesses introduced by the Government of various statements made by Kawakita as indicative of his state of mind."

After the decision on appeal a motion was made in the District Court to modify the sentence of death, principally upon the ground that the Japanese commander of the prisoner-of-war camp where petitioner's acts of treason were committed received only a fifteen-year sentence of imprisonment following conviction of war crimes involving ill-treatment of prisoners of war. The motion was denied. The Court said :

" The argument thus advanced overlooks entirely the fact that the status of the camp commander was that of enemy alien owing no allegiance to the United States, while the status of the defendant was that of an American citizen owing full allegiance to this country.

" Considerations involving foreign relations which were urged upon oral argument are properly addressed only to the executive department, since the separation of governmental powers provided in the Constitution so decrees. U.S.Const.Art.

---

[1] *Haupt* v. United States, 1946, 330 U.S. 631, 67 S.Ct. 874, 91 L.Ed. 1145.

Case No. 73 *Contd.*

II, § 2, cl. 2. As the Supreme Court said in *United States* v. *Curtiss-Wright Export Corp.*, 1936, 299 U.S. 304, 319, 57 S.Ct. 216, 220, 81 L. Ed. 255 : ' In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.' "

On writ of *certiorari* from the affirmance of the conviction by the Courts of Appeal,

Held (by the Supreme Court, Vinson C.J. and Black and Burton JJ. dissenting) : that the conviction must be affirmed. The Court said :

" Petitioner defended at his trial on the ground that he had renounced or abandoned his United States citizenship and was expatriated. Congress has provided by Sec. 401 of the Nationality Act of 1940, 54 Stat. 1137, 1168, as amended, 8 U.S.C. Sec. 801, 8 U.S.C.A. Sec. 801, that a national of the United States may lose his nationality in certain prescribed ways. It provides in relevant part,

> ' A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by :
>
> ' (*a*) Obtaining naturalization in a foreign state . . . ; or
>
> ' (*b*) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state ; or
>
> ' (*c*) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state ; or
>
> ' (*d*) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political sub-division thereof for which only nationals are eligible ; '

" Petitioner asks us to hold as a matter of law that he had expatriated himself by his acts and conduct beginning in 1943.

" The difficulty with petitioner's position is that the implications from the acts, which he admittedly performed, are ambiguous. He had a dual nationality, a status long recognized in the law. *Perkins* v. *Elg*, 307 U.S. 325, 344–349, 59 S.Ct. 884, 894–896 L. Ed. 1320. The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other. In this setting petitioner's registration in the Koseki might reasonably be taken to mean no more than an assertion of some of the rights which his dual citizenship bestowed on him. The deposition of the Attorney General of Japan states that the entry of a person's name in the Koseki is taken to mean that one has Japanese nationality. But since petitioner already had Japanese nationality, he obviously did not acquire it by the act of registration. The Attorney General of Japan further deposed that all Japanese nationals, whether or not born abroad, are duty bound to Japanese allegiance and that registering in the Koseki is not necessarily a formal declaration of allegiance but merely a reaffirmation of an allegiance to Japan which already exists. From this it would appear that the registration may have been nothing more than the disclosure of a fact theretofore not made public.

" Conceivably it might have greater consequences. In other settings it might be the equivalent of ' naturalization ' within the meaning of Sec. 401 (*a*) of the Act or the making of ' an affirmation or other formal declaration of allegiance ' to Japan within the meaning of Sec. 401 (*b*). Certainly it was relevant to the issue of expatriation. But we cannot say as a matter of law that it was a renunciation of petitioner's American citizenship. What followed might reasonably be construed to mean no more than recognition of the Japanese citizenship which petitioner had acquired on birth—nationality that was publicly disclosed for the first time in Japan by his registration in the Koseki. Cf. 3 Hackworth, *Digest of International Law* (1942), p. 373. The changing of his registration at the police station and at the University, so as to conform those records to the public record of his Japanese nationality, might reasonably mean no more than announcing the fact of his Japanese nationality to the interested authorities.

" As we have said, dual citizenship presupposes rights of citizenship in each country. It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other. For example, when one has a dual citizenship, it is not necessarily inconsistent with his citizenship in one nation to use a passport proclaiming his citizenship in the other. See 3 Hackworth, *supra*, p. 353. Hence the use by petitioner of a Japanese passport on his trip to China, his use of the Koseki entry to obtain work at the Oeyama camp, the bowing to the Emperor, and his acceptance of labor draft papers from the Japanese government might reasonably mean no more than acceptance of some of the incidents of Japanese citizenship made possible by his dual citizenship.

" Petitioner contends that a person who has a dual nationality can be guilty of treason only to the country where he resides, not to the other country which claims him as a national. More specifically, he maintains that while petitioner resided in

Case No. 73 *Contd.*

Japan he owed his paramount allegiance to that country and was indeed, in the eyes of our law, an alien enemy.

" The argument in its broadest reach is that treason against the United States cannot be committed abroad or in enemy territory, at least by an American with a dual nationality residing in the other country which claims him as a national. The definition of treason, however, contained in the Constitution contains no territorial limitation. 'Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.' Art. III, § 3. A substitute proposal containing some territorial limitations was rejected by the Constitutional Convention. See 2 Farrand, *The Records of the Federal Convention*, pp. 347–348. The Act of April 30, 1790, 1 Stat. 112, which was passed by the first Congress defining the crime of treason likewise contained no territorial limitation ; and that legislation is contained in substantially the same form in the present statute. 18 U.S.C. (Supp. IV) § 2381, 18 U.S.C.A. 2381. We must therefore reject the suggestion that an American citizen living beyond the territorial limits of the United States may not commit treason against them. See *Chandler* v. *United States*, 1 Cir., 171 F. 2d 921, 929–930 ; *Burgman* v. *United States*, 88 U.S.App. D.C. 184, 188 F. 2d 637, 640.

" One who has a dual nationality will be subject to claims from both nations, claims which at times may be competing or conflicting. Dual nationality, however, is the unavoidable consequence of the conflicting laws of different countries. See 3 Hackworth, *supra*, pp. 352 *et seq*. One who becomes a citizen of this country by reason of birth retains it, even though by the law of another country he is also a citizen of it. He can under certain circumstances be deprived of his American citizenship through the operation of a treaty or an act of Congress ; he can also lose it by voluntary action. See *Perkins* v. *Elg*, *supra*, 307 U.S. at page 329, 59 S.Ct. at page 887. But American citizenship, until lost, carries obligations of allegiance as well as privileges and benefits. For one who has a dual status the obligations of American citizenship may at times be difficult to discharge. An American who has a dual nationality may find himself in a foreign country when it wages war on us. The very fact that he must make a livelihood there may indirectly help the enemy nation. In these days of total war manpower becomes critical and everyone who can be placed in a productive position increases the strength of the enemy to wage war. Of course, a person caught in that predicament can resolve the conflict of duty by openly electing one nationality or the other and becoming either an alien enemy of the country where he resides or a national of it alone. Yet, so far as the existing law of this country is concerned, he need not make that choice but can continue his dual citizenship. It has been stated in an administrative ruling of the State Department that a person with a dual citizenship who lives abroad in the other country claiming him as a national owes an allegiance to it which is paramount to the allegiance he owes the United States. That is a far cry from a ruling that a citizen in that position owes no allegiance to the United States. Of course, an American citizen who is also a Japanese national living in Japan has obligations to Japan necessitated by his residence there. There might conceivably be cases where the mere nonperformance of the acts complained of would be a breach of Japanese law. He may have employment which requires him to perform certain acts. The compulsion may come from the fact that he is drafted for the job or that his conduct is demanded by the laws of Japan. He may be coerced by his employer or supervisor or by the force of circumstances to do things which he has no desire or heart to do. That was one of petitioner's defenses in this case. Such acts—if done voluntarily and willfully—might be treasonable. But if done under the compulsion of the job or the law or some other influence, those acts would not rise to the gravity of that offense. The trial judge recognized the distinction in his charge when he instructed the jury to acquit petitioner if he did not do the acts willingly or voluntarily ' but so acted only because performance of the duties of his employment required him to do so or because of other coercion or compulsion'. In short, petitioner was held accountable by the jury only for performing acts of hostility toward this country which he was not required by Japan to perform. Circumstances may compel one who has a dual nationality to do acts which otherwise would not be compatible with the obligations of American citizenship. An American with a dual nationality who is charged with playing the rôle of the traitor may defend by showing that force or coercion compelled such conduct. The jury rejected that version of the facts which petitioner tendered. He is therefore forced to maintain that, being a national and a resident of Japan, he owed no allegiance to the United States even though he was an American citizen. That proposition we reject."

[Reports: 96 F. Supp. 824; 190 F. 2d 506; 108 F. Supp. 627; 342 U.S. 932, 72 Sup.Ct. 378, 96 L. Ed. 694.]

Note.—The decision of the Supreme Court is noted in *American Bar Association Journal*, 38 (1952), p. 848, *Georgia Bar Journal*, 15 (1952), p. 329, and *Southern California Law Review*, 26 (1953), p. 438.

See also *Hayashi* v. *Lorenz* (1954), 42 Cal. 2d 848, 271 F. 2d 18, discussing the effect of the proceedings in the principal case upon an action by petitioner with respect to the sale of his property by a guardian appointed during his stay in Japan.

For a discussion of dual nationality, see *Tomasicchio* v. *Acheson* (1951), 98 F. Supp. 166. For a holding that the Geneva Convention relative to the Treatment of Prisoners of War, 1929, does not affect

Case No. 73 *Contd.* the United States law of treason, see *D' Aquino* v. *United States* (1951), 192 F. 2d 338, 365–366, *certiorari* denied (1952), 343 U.S. 935, 72 S.Ct. 772, 96 L. Ed. 1343.

On dual nationality and deprivation of United States citizenship by birth, see also *Okimura* v. *Acheson* (1951), 99 F. Supp. 587, reversed (1952), 342 U.S. 899, 72 S.Ct. 293, 96 L. Ed. 674, and *Murata* v. *Acheson* (1951), 99 F. Supp. 591, reversed (1952), 342 U.S. 900, 72 S.Ct. 294, 96 L. Ed. 674. With further respect to expatriation see *Kanbara* v. *Acheson* (1952), 103 F. Supp. 565, and *Mastrocola et Al.* v. *Acheson* (1952), 105 F. Supp. 580. *Gualco et Al.* v. *Acheson* (1952), 106 F. Supp. 760, contains extended discussion of United States law relating to dual nationality. See also *Acheson, Secretary of State* v. *Wohlmuth* (1952), 196 F. 2d 866, *certiorari* denied, 344 U.S. 833, 73 S.Ct. 40, 97 L. Ed. 648 (reported in *International Law Reports*, 1952, Case No. 59, and see the cases there noted).

With further respect to expatriation, see *American Journal of International Law*, 46 (1952), p. 158.

Case No. 74

Nationality — Double Nationality — Effective Nationality — Nationality of Married Women—Jurisdiction—In Respect of Nationals.

S. *v.* S.

Switzerland, Cour de Justice Civile (Court of Appeal) of Geneva. November 17, 1950.

The Facts.—This was an action in divorce. Both parties had both French and Swiss nationality. The husband had, on November 3, 1948, instituted an action in divorce before the Tribunal Civil of Saint-Julien-en-Genevois (France), which declared itself competent. The wife thereupon appealed to the Court of Appeal of Chambéry on the issue of competence ; in support of her appeal she contended that her husband was a Swiss national. The Court of Appeal confirmed the decision of the lower Court, on the ground that, in view of the French nationality of the parties, Article 15 of the French Civil Code was applicable to them irrespective of their Swiss nationality. That Article provides : " A French national may be cited before a French court for obligations contracted abroad even towards an alien ". In the meantime, the wife had instituted an action in divorce in the Court of first instance in Geneva on November 5, 1948. The husband contested the competence of the Swiss courts, and invoked his French nationality in this connection. By judgment of November 1, 1949, the Court of first instance of Geneva declared itself competent. This was an appeal from that decision.

Held: that the judgment of the Court below must be confirmed. The Court said, in part :

" Both S. and the wife have double nationality, Swiss and

French. S. has never repudiated his Swiss nationality. Accordingly, he still enjoys his Swiss '*droit de cité*' and must be considered by Swiss tribunals to be Swiss. On the other hand, the fact that Mrs. S. before her marriage claimed French nationality does not mean that she has only that nationality. In accordance with Article 161 of the Swiss Civil Code, the wife acquires the '*droit de cité*' of the husband of Swiss nationality. Even if the declaration of French nationality signed by Miss B. on March 22, 1944, at the French Consulate-General in Geneva had resulted in her immediate acquisition of French nationality alone—which is not the case—she would have reacquired Swiss nationality by virtue of her marriage with S., a Swiss citizen, on March 23, 1944. In any case, the declaration of March 22, 1944, according to its very terms, could take effect only six months after the marriage. Thus, on her marriage Mrs. S., as well as her husband, had Swiss nationality; the declaration of March 22, 1944, could not modify that position, or limit the principle of Article 161 of the Swiss Civil Code with regard to Swiss law. Swiss courts must consider the spouses S. to be Swiss nationals.

"Accordingly, the competence of the Geneva courts to hear the action in divorce instituted by Mrs. S. cannot be doubted. . . . Swiss courts are bound to apply Swiss law alone in the case of divorce actions concerning persons of multiple nationality. . . . In fact, a citizen who has both Swiss nationality and a foreign nationality is treated as though he had only Swiss nationality. . . ."

[Report: *La Semaine judiciaire*, 73 (1951), p. 387.]

Nationality—Dual Nationality—Recognition by State of One Nationality of Decree of Divorce of Court of State of Other Nationality—Overriding Effect of Nationality Acquired by Marriage. **Case No. 75**

S. *v.* REGISTRATION OFFICER.

Holland, District Court of The Hague. October 17, 1951.

THE FACTS.—In July 1945 the plaintiff, a Netherlands citizen, married a German national. Under German law, she thereby acquired German citizenship but did not lose her Netherlands nationality, which was saved by the Emergency Decree of May 22, 1943 (*Staatsblad*, No. D 16), which excepted cases of this kind from the operation of the general rule of Article 8 of the Netherlands Nationality Law of 1892. In March 1950 she obtained a divorce from a German court and later gave notice of intention to contract a new marriage in Holland. The Registration Officer refused to permit the marriage on the ground that the German divorce was not

Case No. 75 *Contd.* recognized under Dutch law. She appealed against this refusal.

Held: that the appeal must succeed, and the plaintiff was free to contract a new marriage. In the matter of divorce her German nationality prevailed over her Netherlands citizenship, so that German law applied and the German decree must be recognized in the Netherlands as valid.

[Report: *N.J.*, 1952, No. 337.]

NOTE.—The District Court of Haarlem gave a judgment in a similar sense on February 20, 1951, in a case in which the husband was a Netherlands citizen and the wife of German origin. The wife had acquired Netherlands nationality by her marriage during the war, but lost it under another Emergency Decree (of November 17, 1945: *Staatsblad*, No. F 278). On July 3, 1950, the marriage was dissolved by a decree of divorce made by a German court on a ground unknown to Dutch law. The woman, who wished to remarry in Holland, obtained the necessary authorization from the Dutch court.

These decisions are in accord with those given in previous cases since 1948; see, for example, *Annual Digest*, 1949, p. 227.

IX.—Nationality of Married Women

Case No. 76 **Nationality—Married Women—Marriage to Alien a Nullity under Foreign Law—Non-acquisition of Nationality of Husband—Nationality of Children.**

X. *v.* X.

Holland, District Court of The Hague. December 19, 1950.

THE FACTS.—This was a wife's petition for divorce and alimony. The petitioner, a Netherlands citizen, had married a Greek national in the Netherlands, but without going through the religious ceremony required by Greek law, in the eyes of which, therefore, the marriage was a nullity.

Held: that the petition must succeed and the wife was entitled to divorce with alimony, since the marriage had been validly contracted under Netherlands law. As, however, under Greek law it was a nullity, the wife had not acquired Greek nationality (although the children of the marriage, having been recognized by their father, had acquired Greek nationality).

[Report: *N.J.*, 1952, No. 444.]

Nationality—Married Women—The Law of Belgium.

Case No. 77

MOONS *v.* BECKER.

Belgium, Tribunal Civil of Brussels. March 8, 1951.

THE FACTS.—This was an action in divorce. The petitioner, the wife, was of Belgian origin, but had acquired Dutch nationality by marriage to a Dutch national on November 12, 1938. On December 22 of that year she had, by a statutory declaration, taken the necessary steps to retain Belgian nationality. The question before the Court was what law governed the action in divorce.

Held: that the action was governed by Dutch law. The Court said:

" The statutory declaration concerning retention of nationality is retroactive in effect. From the point of view of Belgian public law the petitioner is thus regarded as never having ceased to be a Belgian national. However, from the date of the marriage to the date of the declaration, the petitioner was in fact subject to Dutch law.

" Marriage is a synallagmatic contract, by which the two spouses adhere to the institution of marriage. That institution is governed by the law which is thus incorporated in the contract binding on the parties. Since both spouses were subject to Dutch law at the time of marriage, that law was incorporated in the contract and governs it. The contract is binding on the parties and cannot be unilaterally modified by one of them. The declaration concerning retention of nationality is a unilateral act which can be made without the authorisation of the husband. It cannot modify the contract and set aside the applicability of Dutch law.

" It cannot be contended that the right to make the declaration is part of the ante-nuptial personal status of the wife which she retains by making the declaration. The Law concerning Nationality does not provide for suspensive or resolutive conditions. It is not possible to say on the day of marriage whether the wife will make the declaration. Accordingly, the marriage is not concluded under a suspensive or resolutive condition concerning the law which will be applicable thereto. Such a situation would be uncertain and out of harmony with the institution of marriage. Moreover, the legislation concerning nationality governs the public status of citizens, but its purpose is not particularly to govern their matrimonial status and to permit one of the spouses to alter it at will.

" Accordingly, the petitioner, in entering into marriage without simultaneously making the declaration concerning the retention of her nationality, adhered, despite her subsequent

Case No. 77 *Contd.* retroactive recovery of her nationality of origin, to Dutch matrimonial law."

[Report : *Pasicrisie belge* (1952), III, p. 38.]

Case No. 78 **Nationality—Married Women—Loss of Nationality—Nationality on Marriage—The Law of Mexico.**

In re FIGUEROA.

Mexico, Supreme Court. September 28, 1951.

THE FACTS.—Exiquio Figueroa sought *amparo* against a judgment in an action in replevin brought by Juana Figueroa de Toruga. The nationality of the plaintiff was at issue.

Held: that the petition for *amparo* must be denied. A Mexican woman does not lose her nationality solely by reason of marriage to an alien. The judgment is reported in summary form as follows :

" According to Article 1, s. 12, of the Law of Alienage and Naturalization of May 28, 1886, a Mexican woman who does not acquire the nationality of her husband upon marriage according to the laws of his country, retains her own nationality. Therefore, where it has not been shown that a woman lost her Mexican nationality through marriage with a Japanese national, it may be assumed that she retains her own nationality, which conclusion conforms to Article 4 of the Law of Nationality and Naturalization of 1934, which provides that ' a Mexican woman who marries a foreigner does not lose her nationality by reason of her marriage '."

[Report : 109 *Semanario judicial de la Federación* (5a Época), Part 3, p. 2827.]

XII.—Nationality of Corporations

[See also Part XI, WAR AND NEUTRALITY : A, VI, *Enemy Character*.]

Case No. 79 **Nationality—Of Companies—Seat of—Political and Economic Control.**

SOCIÉTÉ M. *v.* ADMINISTRATION D'ENREGISTREMENT.

France, Court of Appeal of Algiers. July 13, 1951.

THE FACTS.—The appellant Company was owned by Spanish nationals but had its seat in France. It was asked to pay some extraordinary French taxes. The Company denied that it was under an obligation to pay such taxes in France ; it contended that it had Spanish nationality and that, in virtue of the Franco-Spanish Treaty of January 7, 1862, Spanish nationals were exempt from the payment of such taxes. On behalf of the respondent administration it was contended that since the seat of the Company, and its main production centres, were situated in France, it had French nationality ; some decisions of the Cour de Cassation were cited in support of that view.

Held: that the Company was not required to pay extraordinary taxes, since for fiscal purposes it had Spanish nationality. The Court said :

" The decisions cited by the respondent administration in support of its view relate to private law questions, such as the right of commercial ownership. On the other hand, the most recent jurisprudence of the Supreme Court seems to indicate that the idea of nationality being determined by the seat of a company, if valid in private law, cannot be unreservedly applied in the field of public law. Commercial companies which have their seat in France cannot claim from the State all the privileges enjoyed by French nationals, and, in particular, the right to war damage compensation in conformity with the Law of 1919, which in no way derogated from the general rules relating to nationality of companies. Conversely, in the public law matter of taxation, the mere fact that a commercial company has established its seat in France cannot alone authorise the State to recover from it taxes payable only by French nationals, and from which certain foreign nationals are exempted by treaty. The theory that nationality is determined by the seat of a company seems to be based on a confusion between domicil and nationality—legal notions which, in the case of companies as in the case of individuals, are governed by different rules, and must be kept apart. The seat of a company is its legal domicil, and determines the rights and obligations dependent on that notion. Nationality, on the other hand, which may be defined as ' the legal link between an individual or a company and a certain national community ', must be determined by reference to other criteria and, in particular, by reference to economic or political control exercised over the company. In this case the Company is composed of two partners, who were born in Spain, have Spanish nationality, and are registered with the Spanish consulate. Thus the appellant Company, which consists of Spanish nationals, and the entire capital of which belongs to Spanish nationals, is under foreign control, and must be considered, for the purposes of public law, and, in particular, tax law, to have Spanish nationality, despite the fact that its seat, *i.e.* its domicil, is in France, and the fact that it was established in the manner prescribed by French law, in conformity with the principle *locus regit actum.*"

[Report : *Dalloz hebdomadaire*, 1951, *Jurisprudence*, p. 629.]

C—ALIENS

I.—Admission of Aliens

Case No. 80 **Admission of Aliens—The Right of Political Asylum—Expulsion—Right to Expel—Judicial Review of Executive Acts—The Law of Kenya.**

ABDOU *v.* ATTORNEY-GENERAL OF KENYA.

Kenya, High Court. April 24, 1951.
(Bourke J.)

THE FACTS.—The plaintiff, a prohibited immigrant under the Immigration (Control) Ordinance, s. 5 (1)(j), was taken into custody in Kenya and a deportation order was made under the Immigration (Control) Regulations, regulation 36, for the purpose of deporting him back to Ethiopia. The plaintiff, alleging that this order was made for the purpose of giving effect to Article XI of the Anglo-Ethiopian Agreement of December 19, 1944, which provides for the surrender of deserters or absentees without leave from the armed forces of either Contracting Party who may have entered the territories of the other Party, contested the legality of the order and prayed the Court for a declaration " (*a*) that he was not a member of the Ethiopian forces or a deserter . . ." and " (*b*) that the Ethiopian Government had no valid claim for him to be handed over to it ". He also sought " an injunction restraining the defendants from handing him over to the Ethiopian Government ". The plaintiff denied " that the . . . Agreement [was] applicable to his present circumstances " or that it was any longer " at all enforceable against him in the said Colony " of Kenya, and he " averred . . . that he fled from Ethiopia in fear of his life and sought refuge in the Colony as a political refugee ". He asserted that the order to deport him as an illegal immigrant to the place from whence he had come was merely a device for giving effect to Article XI of the Agreement since it was tantamount to surrendering him to the Ethiopian authorities.

Held: that the case must be dismissed as the plaintiff's averments were irrelevant, and further, that the Court could not go behind a valid deportation order made against the plaintiff as a prohibited immigrant. The deportation of the plaintiff was made under the provisions of the Ordinance and not (as he had alleged) under the Agreement of 1944. According to international law, a State may prohibit immigration into its territories and may, therefore, deport whomsoever it wishes who has contravened its laws by immigrating contrary to their provisions. The right of admission, and hence, the right to deport aliens who enter a country contrary to its wishes, are matters of municipal law.

The Court said: ". . . on the authorities the key to the whole problem lies plainly in this, that admittedly the plaintiff was a prohibited immigrant and that there is an order of deportation valid on its face as to which there is no averment or suggestion in terms that it is illegal or a sham or not made bona fide or that it is in abuse of power. . . . It was accepted in argument by learned counsel for the plaintiff that the deportation of his client would rest upon the order made under section 9 of cap. 51 and not upon Article XI of the Agreement [of December 19, 1944], . . . since that Article is not being resorted to for the purpose of deporting the plaintiff it is indeed difficult to see what bearing the allegations raised by the defendant can have. As I understand it, though perhaps I may be putting it too broadly, the contention of the plaintiff really comes to this, that it is material for him to show that he is a political refugee and so on because the order for deportation when acted upon will have the same effect as if he were handed over in pursuance of Article XI of the Agreement; accordingly, if it would be wrong to act under Article XI, a proposition that he seeks to establish, then it would be wrong to proceed under the order, which, though valid on its face, would be rendered ineffective by the granting of the relief sought.

" In *The King* v. *Superintendent of Chiswick Police Station, ex parte Sacksteder*, [1918] 1 K.B.D. 578, the Home Secretary made an order under the Aliens Restriction Act, 1914, and Article 12 of the Aliens Restriction (Consolidation) Order, 1918, that a certain alien, who was a French subject of military age, should be deported from [the] United Kingdom and should remain out of the United Kingdom during the continuance of the war. The order was made in consequence of an arrangement between the French and British Governments by which French subjects resident in the United Kingdom who were liable to military obligations in France were sent to France. . . . On an application for a writ of habeas corpus it was argued, *inter alia*, that the Home Secretary intended to do an illegal act, namely, to hand the defendant over to the French military authorities and that the Court had power to go behind the order for arrest and see if ' what was really in contemplation was the exercise of an abuse of power '. . . ."

The Court then quoted Pickford L.J. ([1918] 1 K.B.D. at pages 584 and 586) who referred to the remarks of Low J. in *Rex* v. *Governor of Brixton Prison*, [1916] 2 K.B.D. 742, 752, and to *Ex parte Duke of Château-Thierry*, [1917] 1 K.B.D. 922, and continued by observing that " I am not prepared to say that in every case where there is an order of detention or imprisonment the Court is entitled to go behind that and see what the motives for making that order were. But I certainly

Case No. 80 *Contd.*

am not inclined to say that in no case can the Court go behind an order which on the face of it is valid. . . . If that order is, if I may say so, practically a sham, if the purpose behind it is such as to show that the order is not a genuine or bona fide order, it seems to me the Court can go behind it. . . . I do not think the fact of the motive being to carry out the Agreement between France and this country is sufficient to show that this order to detain the appellant until he can be placed on board a ship, even though that ship may be going to France, is enough to entitle us to say it is an invalid order and that the custody was not a legal custody." The Court also quoted from the judgment, in the same case, of Warrington L.J. (p. 589) to the effect that " in the present case . . . the order is on the face of it valid, and there is no pretence for saying that it is a sham order or anything of the kind, nor is there any pretence for saying that under it or in consequence of it something illegal is going to be done by any of the officers of the Executive Government. As soon as a ship leaves these shores the functions of the Executive Government come to an end. What happens after that is no concern of theirs, and I think it is not for us to consider what may be the ultimate motive with which the Secretary of State may make the order. . . ."

The Court continued : " In my opinion that case [*Rex* v. *Superintendent of Chiswick Police Station, ex parte Sacksteder*] affords very strong authority in support of the arguments for the defendant. The order for deportation is on the face of it valid—no one disputes that the plaintiff is a prohibited immigrant and [that] the legislation provides for the deportation of such a person. There is no pretence for saying, and indeed it is not said, that it is a sham order or anything like that, nor can it be said having regard to section 10 of the Ordinance that under it deporting the plaintiff ' whence he came ', that is, to Ethiopia, anything illegal is going to be done. . . . It has not been conceded that the order of deportation springs from and is motivated by any representations made as a result of the 1944 Agreement. But even if any such motive were acknowledged it seems to me that there is no vital difference in the legal aspect where in the one place a valid order is made under legislation providing for the deportation of aliens whom the Secretary of State thought it was not right to allow to remain in the United Kingdom, such order being made in consequence of an agreement with France to place subjects of that allied country of military age within its jurisdiction, and in the other where a valid order is made under legislation providing for the deportation of prohibited immigrants in consequence of an agreement with Ethiopia to hand over deserters or absentees without leave from the Ethiopian forces. For the purpose of argument of course it is admitted that the plaintiff is not such a deserter or absentee and is a political refugee ; but it is not in question that he is a prohibited immigrant. Just as in *Rex* v. *Chiswick Police Station Superintendent*, what happens after the order is carried out is no concern of the Executive Government, and equally it is not for this Court to consider what may be the ultimate motive with which the Governor's Deputy made the order. . . .

" In *Rex* v. *Home Secretary, ex parte Château-Thierry*, [1917] 1 K.B.D. 922, it was held that the jurisdiction of the Secretary of State to make a deportation order under the provisions of section 1, sub-section 1, of the Aliens Restriction Act, 1914, and of the Aliens Restriction (Consolidation) Order, 1916, is not affected by the fact that the alien is a political refugee, though that fact may properly be taken into account by the Secretary of State in considering whether . . . he will make a deportation order. In that case . . . Swinfen Eady L.J. is reported as saying this :

> ' I am of opinion that the respondent has failed to establish that he is a political refugee, or that he is medically unfit to render to his native country any military service whatever. But whether this be so or not, these considerations ought not to affect the judgment in the present case. These are matters to be brought before the Home Secretary when he is considering whether or not to make a deportation order, and they are matters which may properly affect his discretion ; but his power to make a deportation order is not dependent in any way upon the absence of these or any similar circumstances. . . .' "

The Court also quoted from the judgment of Pickford L.J. in the same case (at pp. 932–933) and from that of Scrutton L.J. in *Rex* v. *Chiswick Police Station Superintendent* (*supra*, p. 589), and concluded : ". . . Here is a valid order of deportation made against the plaintiff as a prohibited immigrant. This Court cannot go behind the order to inquire as to the motive for its making. . . . As to the question . . . whether or not the plaintiff must be returned to Ethiopia under the agreement . . . [that] is not a question of municipal law which can be decided by a Kenya Court, it is merely hypothetical. It does not arise because the deportation of the plaintiff does not take place under the Agreement of 1944 but under the provisions of Cap. 51. The arguments I have heard as to the nature and import of an act of state have no bearing having regard to the circumstances of the case. I do not decide the point. I will, however, quote from the judgment of their Lordships of the Privy Council in *Eleko* v. *Officer Administering the Government of Nigeria* [1931] A.C. 662, 671 :—

> ' This phrase (an " act of state ") is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may

Case No. 80 *Contd.* give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the Court to inquire into the legality of the act.' . . ."

[Report: (1951) 24 (2) K.L.R. 13.]

Aliens—Admission of—In Cases of Polygamous Marriages—Whether Certain of the Wives of a Person Domiciled in the Country to which Entry is Sought may be Excluded as Prohibited Immigrants—The Law of South Africa.

See Case No. 89 (*Latiefa* v. *Principal Immigration Officer*).

II.—Position of Aliens

i.—Subjection to Territorial Sovereignty of Receiving State

Case No. 81 **Aliens—Position of—Right of Alien to Question Validity of Legislation—Canadian Provincial Legislation.**

WINNER *v.* S.M.T. (EASTERN) LTD. AND ATTORNEY-GENERAL OF NEW BRUNSWICK *ET AL.*

Canada, Supreme Court.
(Reinfret C.J.C., Kerwin, Tascherau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.)
October 22, 1951.

THE FACTS.—The appellant, an alien, operated a bus service, organized under the laws of Maine, from Boston, U.S.A., through the Canadian Province of New Brunswick to Nova Scotia, and back to Boston. He had been granted a licence to do so, but he was " not to embus or debus passengers in the said Province of New Brunswick ". The appellant did not abide by this limitation, and the respondents obtained an injunction. On appeal, the appellant contended that the Statutes under the authority of which the licence was issued were *ultra vires* the Provincial Legislature of New Brunswick, by virtue of s. 92 (10)(*a*) [1] of the British North America Act, and that therefore the limitations in the licence were invalid. The respondent argued, *inter alia*, that the appellant, being an alien, had no *locus standi* to challenge the constitutionality of the legislation in question : this contention was accepted in the Court below.

---

[1] Section 92 provided in part as follows:

" In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

' 10. Local Works and *Undertakings* other than such as are of the following Classes:—

' (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and *Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.*' "

Held: that the appeal must be allowed. An alien is not disabled from attacking the validity of legislation, which in this case is in fact *ultra vires*. The Court said (*per* Rand J.) : " The first and fundamental accomplishment of the constitutional Act was the creation of a single political organization of subjects of His Majesty within the geographical area of the Dominion, the basic postulate of which was the institution of a Canadian citizenship. Citizenship is membership in a state ; and in the citizen inhere those rights and duties, the correlatives of allegiance and protection, which are basic to that status.

" The Act makes no express allocation of citizenship as the subject-matter of legislation to either the Dominion or the Province ; but as it lies at the foundation of the political organization, as its character is national, and by the implication of head (25), s. 91, ' Naturalization and Aliens ', it is to be found within the residual powers of the Dominion. . . .

" It follows, that a Province cannot prevent a Canadian from entering it except, conceivably, in temporary circumstances, for some local reason as, for example, health. . . . In a like position is a subject of a friendly foreign country ; for practical purposes he enjoys all the rights of the citizen."

Per Kellock J. : " In my opinion, the fact that the appellant is an alien does not affect his right to challenge the legislation in question. As stated by Lord Reading C.J. in *Porter* v. *Freudenberg*, [1915] 1 K.B. 857 at p. 869 : ' Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen '. "

[Report : (1951) 4 D.L.R. 529.]

NOTE.—This case was taken on Appeal to the Privy Council, being reported in [1954] 4 D.L.R. 657. In the Privy Council no consideration was given to the question of alien rights.

iii.—Treatment by and Responsibilities of the Receiving State

Case No. 82 **Aliens—Treatment of—Most-Favoured-Nation Treatment—Commercial Leases—Franco-Latvian Treaty of 1937—States—Extinction of—Absence of Formal International Act—Extinction of Latvia—Nationality—Acquisition of—Proof of.**

GERBAUD *v.* MEDEN.

France, Cour de Cassation. January 10, 1951.

THE FACTS.—This was an appeal against a judgment of the Court of Appeal of Aix-en-Provence, of December 28, 1945, to the effect that the respondent, a Latvian national, was entitled to a renewal of her lease of premises owned by the appellant in virtue of the Law of June 30, 1926, concerning commercial property. It was contended on behalf of the appellant, firstly, that it had not been proved that the respondent, who was of French origin, had become a Latvian national ; secondly, that Latvian nationals were not entitled to the benefit of the Law on commercial property since French nationals were not given reciprocal benefits by Latvian legislation ; and, thirdly, that the respondent could not rely on the Franco-Latvian Treaty of 1937 containing a most-favoured-nation clause, since Latvia had ceased to exist.

Held: that the appeal must be dismissed. The acquisition of foreign nationality had to be proved, but sufficient evidence had been brought for that purpose. Aliens who were directly or indirectly assimilated to French nationals by treaty were entitled to the benefit of the laws on commercial property despite the absence of legislative reciprocity. There was a treaty so assimilating Latvian nationals. The disappearance of Latvia as a subject of international rights had not been determined by any international act. The Court said :

" It appears from the contested judgment that the respondent in 1917 married one Meden, born in Courland, which became the independent Latvian Republic after the War of 1914–1918. She has produced a number of documents showing that she resided in Latvia from 1918 to 1928, claiming Latvian nationality on all relevant occasions, including the signature of the disputed lease. While a person who claims to have acquired foreign nationality must prove that that is so, all modes of evidence are admissible. A subsequent change of nationality cannot be presumed. Accordingly, the Court of Appeal was justified in finding, on the basis of the facts before it, that the respondent proved by means of a series of serious, precise and concordant presumptions that she had Latvian nationality, 'as had always been recognised in France'.

"The appellant contends that the Court of Appeal erred in granting the respondent the benefit of the Law of June 30, 1926, since analogous rights were not granted to French nationals by her national law. However, the interpretative Law of May 28, 1943, which is still in force, provides, in Article 2, that 'diplomatic treaties which directly or indirectly assimilate aliens to French nationals in matters of civil rights or relating to the Law which is invoked shall be deemed to exempt such aliens from the requirement of legislative reciprocity'.

"The disputed decision points out that the Franco-Latvian Convention of October 1, 1937, provides 'that the nationals of each of the contracting parties shall enjoy in the territory of the other most-favoured-nation treatment . . . in matters of commerce and industry; . . . the right to lease immovable property'. It could accordingly be concluded that, for both matters, the Treaty assimilates Latvian nationals to French citizens, at least indirectly, and thus entitles them to the benefit of the law concerning the renewal of commercial leases.

"No act of international scope has cancelled the disappearance of the State of Latvia. No Treaty has confirmed its extinction as a subject of legal rights and obligations. Accordingly, the lower Court held correctly that 'as long as the Treaty of Peace has not decided the future of Latvia, it is not possible to say that Latvians have become stateless'."

[Report: *Sirey*, 1951, II, p. 207.]

Aliens—Treatment of—Security for Costs—War—Effect of Outbreak of—On Enemy Aliens. **Case No. 83**

TURK *v.* BOURDIER.

France, Court of Appeal of Pau. June 28, 1950.

THE FACTS.—This was a civil action by an Austrian national against a French national for the recovery of a motor-car. The action succeeded in the Court of first instance. On appeal, the appellant asked for security for costs, which may be required, under French law, of alien plaintiffs instituting a civil action against a French subject. The question before the Court was whether there was a treaty exempting respondent from the giving of such security.

Held: that the respondent had not proved the existence of a treaty or diplomatic convention between France and Austria exempting Austrian nationals from giving security for

Case No. 83 *Contd.* costs, and that it was difficult to grant such a favour to an Austrian as long as a Peace Treaty had not been signed with Austria.

[Report : *Sirey*, 1951, II, p. 72.]

Case No. 84 **Aliens—Treatment of—Right to Sue—Security for Costs—Italian Nationals in France.**

BERTUZZI *v.* ÉTS. SANTARELLI FRÈRES.

France, Tribunal Civil of Bastia. April 6, 1951.

THE FACTS.—The plaintiff in this case was an Italian national ; the defendant firm was French. The defendant firm asked the Court for a preliminary ruling requiring the plaintiff, as an alien suing French nationals in France, to give security for costs. It was contended on behalf of the plaintiff that Italian nationals in France were exempt from the payment of security for costs by virtue of the Franco-Sardinian Treaty of March 24, 1760, which was extended to the whole of Italy in 1860.

Held: that the plaintiff must give security for costs. The Court said :

" The plaintiff is an Italian national. Subsequent to the extension to the whole of Italy of the Franco-Sardinian Treaty of March 24, 1760, a Treaty was concluded between France and Italy on February 29, 1860, which exempts from the payment of security for costs only poor persons who have obtained legal aid. Article 44 of the Treaty of Peace signed with Italy on February 10, 1947, provided that each of the Allied or Associated powers will inform Italy, within six months from the coming into force of the Treaty (September 15, 1947), which bilateral treaties concluded with Italy before the war it desires to keep in force or to revive. No agreement concerning security for costs exists between France and Italy."

[Report : *Revue critique de Droit international privé,* 40 (1951), p. 497.]

NOTE.—There does in fact exist a treaty exempting Italian nationals in France from the payment of security for costs, namely, the Franco-Italian Convention on the execution of judgments in civil and commercial matters, of June 3, 1930, which was again brought into force as from March 1, 1948, in pursuance of Article 44 of the Treaty of Peace with Italy, 1947.

Aliens—Treatment of—Carrying on of Business.

Case No. 85

In re GALETZKY.

France, Conseil d'État. June 15, 1951.

THE FACTS.—Under Decrees of June and November 1938 the French Government is empowered to fix, for each category of industry or commerce, the percentage of aliens permitted to be employed therein. Furthermore, an alien is prohibited from exercising an industrial or commercial profession in France without obtaining a special permit. A Decree of February 2, 1939, sets forth certain cases in which such a permit must be refused. The petitioner had applied for a permit to exercise a commercial profession. That request was refused on the ground that " the funds available were, in principle, reserved for French nationals ". It was now contended on behalf of the petitioner that this was not one of the grounds on which the permit could be refused under the Decree of February 2, 1939.

Held: that the decision not to grant the permit must be annulled. The Court said :

" The Decree of February 2, 1939, sets forth certain cases in which aliens must be refused a permit to exercise a commercial profession. It does not deprive the Administration, in other cases, of the power to consider, in respect of each request, the desirability of issuing or refusing a permit. However, in refusing a permit to the petitioner the Minister of Industry and Commerce relied exclusively on the ground that ' the funds available were, in principle, reserved for French nationals '. The decision is thus not based on any motive arising from the examination of the individual case, but on the affirmation of a general principle which cannot be deduced from the relevant legal provisions. It thus misinterprets the laws and regulations applicable to the matter."

[Report : *Dalloz hebdomadaire*, 1951, *Jurisprudence*, p. 531.]

Aliens—Treatment of—Enemy Aliens—The Law of France.

Case No. 86

UASSELLE *v.* MARABINI.

France, Tribunal Civil de la Seine. March 9, 1950.

THE FACTS.—The defendant, an Italian national, was tenant of commercial premises owned by the plaintiff under a lease which, after various renewals, expired on July 1, 1946. A Law of April 18, 1946, extended the currency of existing commercial leases, by operation of law, until January 1, 1949. The defendant remained on the leased premises in reliance on that Law. The plaintiff now asked the Court to order his

Case No. 86 *Contd.* eviction, on the ground that an enemy national was not entitled to hold commercial property, and accordingly was not entitled to the benefit of the Law of April 18, 1946.

Held: that the action must fail. The Court said:

"The laws concerning the extension of leases contain no provision excluding enemy aliens. All aliens, irrespective of nationality, are accordingly entitled to the benefit of those laws as soon as they are entitled to engage in commerce in France."

[Report: *Sirey*, 1951, II, p. 30.]

Case No. 87 **Aliens—Position of—Application for Dependants' Relief—The Law of Canada.**

Re Kvasnak.

Canada, Court of Appeal, Saskatchewan.
(Martin C.J.S., Gordon, Procter, McNiven, and
Cullington JJ.A.)
May 1, 1951.

The Facts.—The applicant, Pavaska Kvasnakova, claimed to be the lawful wife of Peter Kvasnak, whom she married in Czechoslovakia in 1925. In 1927 Peter Kvasnak came to Canada, leaving his wife in Czechoslovakia, and in 1930 he married Mary Kiszkan. In 1948 he made a will making provision for the maintenance of his wife in Czechoslovakia; in 1949 he died, domiciled in Saskatchewan. Where a person dies so domiciled, leaving dependants, the Dependants Relief Act, 1940,[1] allows an application to be made by or on behalf of any dependant for an order making reasonable provision for maintenance. Such an application must be made within six months of the grant of probate, but an application at a later date may be allowed if the Court "deems it just". Pavaska Kvasnakova, a dependant for the purposes of the Act, sought an order allowing application within 2 years 7 months of probate. In the lower Court such an order was granted; Mary Kvasnak appealed on the grounds indicated in the judgment (see "*Held*" below).

Held: that the appeal must be dismissed. Aliens are under no disability in enforcing rights to property, and in the circumstances it is "just" to allow an extension of time. The Court said:

"Counsel for the executrix contended (and this was the only serious contention advanced) that the applicant, being an alien, has no status to make an application under the Act. The deceased, however, was domiciled in the jurisdiction at the time of his death and the applicant claims as his wife and is therefore a dependant. The Canadian Citizenship Act, 1946 (Can.), c. 15 s. 29, makes it clear that there is no disability on an alien asserting rights to property. That section provides that real and personal property of every description may be 'taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born Canadian citizen'. At Common Law, and after 1844 by the Naturalization Act [1] of that year, an alien was in the same position as a natural-born British subject with regard to all personal property—except chattels real, such as leaseholds and British ships; but an alien was unable to hold real estate or chattels real before 1870. In that year, the Naturalization Act, 1870 (Imp.), c. 14, placed aliens on the same footing as natural-born British subjects with regard to property both real and personal with the sole exception of British ships. The language of s. 29 of the Canadian Citizenship Act is similar to that contained in the British Naturalization Act of 1870. . . . In *Halsbury's Laws of England*, vol. 1 (2nd ed.), pp. 450–1, the learned author states:

---

[1] R.S.S. 1953, c. 121.

" '760. With the exception of a British ship an alien can now acquire, hold, and dispose of real property in the United Kingdom and personal property of every description in the same manner as a natural-born British subject; and a title to real property in the United Kingdom and personal property of every description can likewise be derived through, from, or in succession to, an alien.' "

[Report: (1951) 3 D.L.R. 412.]

Aliens—Position of—In Respect of Marriage—Aliens Endangering Safety of State—Aliens Without Identity Papers. **Case No. 88**

In *Communes of Aarau and Altenrhein* v. *Noger*, decided by the Swiss Federal Tribunal on February 3, 1949 (A.T.F. 75, II, 1; *La Semaine judiciaire*, 73 (1951), p. 111), it was *held* that Article 54, para. 2, of the Federal Constitution, which prohibits any limitation on the right to marry based on the previous conduct of the parties or any other reason of administration and police, did not apply to the case where a woman expelled from Switzerland could make the expulsion order valueless by marrying a Swiss citizen. Where the woman had been expelled on the ground that she had endangered the internal or external safety of the Confederation, authorization to marry her must be refused to a Swiss national. On the other hand, authorization to marry could not be refused on the ground that the woman had been refused a residence permit merely because she had no identity papers, or no means of support.

---

[1] 7 & 8 Vict., c. 66.

Case No. 89 **Aliens—Position of—Alien Detained as Prohibited Immigrant Pending Expulsion—Lawfulness of Such Detention—Person Domiciled in Country where Alien is Detained Seeking to Marry Her—Application for Court Order to Obtain Facilities to do so—Whether such Order may be Granted—Jurisdiction of the Courts in Immigration Cases—Polygamous Marriages—Whether Certain of the Alien Wives of a Person Domiciled in the Country to which Entry is Sought may be Excluded as Prohibited Immigrants—The Law of South Africa.**

HARNEKER *v.* GAOL SUPERINTENDENT.

South Africa, Supreme Court, Cape Provincial Division.
(Searle J.)
April 2, 1951.

LATIEFA *v.* PRINCIPAL IMMIGRATION OFFICER.[1]

South Africa, Supreme Court, Cape Provincial Division.
(Ogilvie Thompson J. and Broeksma A.J.)
April 30, 1951.

THE FACTS.—Hassan Harneker, while on a visit to India, married a certain Latiefa, according to Mohammedan rites, in April 1944. Harneker was himself domiciled in the Cape Province of the Union of South Africa, and he returned there shortly after his wedding. In 1937 he had contracted a marriage in the Union, according to Mohammedan rites, with one Janap Khan; though this marriage was dissolved, under Moslem law, in December 1944. Janap Khan remarried and settled in the Province of Natal. In 1950 Harneker's new wife, Latiefa, entered the Union, and was declared by the Principal Immigration Officer to be a prohibited immigrant in terms of sec. 4 (1)(*a*) of Act 22 of 1913. She appealed against this decision to the Immigration Appeal Board, which dismissed her claim but reserved certain questions of law for decision by the Cape Provincial Division of the Supreme Court. While awaiting this decision (eventually given in *Latiefa* v. *Principal Immigration Officer, infra*) Latiefa was left at liberty until February 19, 1951, when she was taken into custody and detained in gaol, pending possible deportation if the Court upheld the findings of the Immigration Appeal Board.

Meanwhile, Harneker had discovered that, as none of his marriages constituted a lawful marriage in the eyes of South African law (though his first with Janap Khan was one recognized as a " union " for purposes of the Immigration Act), no impediment existed to his marrying Latiefa in accordance with the requirements of local law. Some time before her imprisonment the two of them executed an ante-nuptial contract, which was registered in the Deeds Office ; and they requested the magistrate at Wynberg, near Cape Town, to marry them. He refused to do so, as Latiefa had been declared a prohibited immigrant. It was later ascertained that this was no legal bar to the marriage. Before further steps could be taken she was detained. Harneker applied to the Gaol Superintendent for the necessary facilities to marry her in prison, but the Superintendent refused to grant them without the consent of the Principal Immigration Officer. This consent was withheld.

---

[1] As both these cases, while deciding different points of law, proceed on the same set of facts, they are here reported together.

Harneker, joined by Latiefa " as far as necessary ", petitioned the Cape Provincial Division of the Supreme Court (*Harneker* v. *Gaol Superintendent*) for an order compelling the Gaol Superintendent to grant all reasonable facilities for the celebration of the ceremony ; and for an order permitting Latiefa to be visited and examined by a doctor, other than the one appointed by the prison authorities. The applicant stated that Latiefa was now pregnant by him, and that, since detention, her health had been deteriorating.

Both orders were contested by the Gaol Superintendent. It was admitted that if the facilities for contracting the marriage were granted Latiefa would cease to fall within the category of " prohibited immigrant ", and would thus be entitled to reside in the Union. The arguments advanced by both sides are summarized in the judgment.

Held : that neither order could be granted. Unless it could be proved that the Immigration Officer was acting outside the scope of his jurisdiction in refusing to consent to the granting of facilities for the wedding, the Court had no power to grant the first order. The second order was refused as the applicant had failed to establish that Latiefa was not receiving proper medical attention from the prison doctor.

I. *Lawfulness of the Detention of a Prohibited Immigrant Pending Possible Deportation.* The Judge said : " Mr. van Wyk on behalf of the applicants advanced argument in the alternative. Firstly he maintained that the detention of the second applicant by the respondent is not a lawful detention under Act 22 of 1913, and secondly in the alternative, if her detention is lawful respondent has no power in law to refuse her the privileges now sought. It is common cause that she has been declared a prohibited immigrant under Act 22 of 1913, and that under sec. 19 sub-sec. 3 of the Act a prohibited immigrant may be arrested and detained pending removal from the Union. The relevant portion of sec. 19 (3) as substituted by sec. 2 of Act 27 of 1937 reads as follows :

Case No. 89 *Contd.*

'An immigration officer may, if he (*i.e.* the prohibited immigrant) is not in custody, arrest him or cause him to be arrested without warrant, and may remove him or cause him to be removed from the Union or from the said Province under a warrant, and pending such removal may detain him or cause him to be detained in a manner prescribed by regulation.'

Under sec. 26 (1)(*d*) of Act 22 of 1913 the Governor-General may make regulations prescribing :

'The procedure for, and manner of, the detention of prohibited immigrants . . . pending their removal from the Union or any Province, and the procedure necessary for and the manner of any such removal.'

It would appear that the only regulation promulgated prescribing the manner of detention for the purposes of sec. 19 (3) *supra* is Reg. 26 (1) and (2) (published under Government Notice 1055 of 29th June 1928), which reads as follows :

'(1) Save as is otherwise provided in the Act, any person detained in custody thereunder may be detained at any place at which persons undergoing civil imprisonment or under arrest awaiting trial are liable to be detained, or in any place specially provided for the detention of prohibited immigrants, or if there is no such place available, then at any other place that may be convenient, regard being had to the circumstances.

'Any gaoler or immigration guard shall accept custody of any such person on the order of the immigration officer, but no person shall be detained in custody for any longer period than is necessary for the purposes of any prescribed enquiry or for the completion by the immigration officer of arrangements for the removal of such person from the Union or any Province at first reasonable opportunity.'

Mr. van Wyk contends in the circumstances, that these regulations do not prescribe " a manner " of detention, but merely the place at which such person may be detained, and that therefore there can be no lawful detention under sec. 19 (3) *supra* at all. I cannot agree with this contention as, in my opinion, Reg. 26 (1) does prescribe the manner of detention for the purposes of sec. 19 (3) of Act 22 of 1913 ; *viz.* at certain defined places failing which at any place which may be convenient in the circumstances. The fact that every detail of the daily routine of a person while so detained is not prescribed does not deprive the proper authority of the power to detain a prohibited immigrant in the manner so prescribed for the purposes of the object laid down in the Act. Such authority, in my view, by implication of law must nevertheless always possess all necessary powers as to the controlling of the daily routine, *etc.*, in the detention of prohibited immigrants in such a manner as is reasonably required in the circumstances in order to achieve the objects of the detention authorized by the

Act, *i.e.* for the due and practical removal from the Union of the prohibited immigrant in accordance with the law. The fact that the detention must be prolonged pending the decision of a point of law reserved (*Latiefa* v. *Principal Immigration Officer, infra*) alters the duration though not necessarily in other respects the manner of such detention."

[Report : 1951 (3) S.A. 430 [C].]

II. *Latiefa* v. *Principal Immigration Officer. Polygamous Marriages. Whether Certain of the Alien Wives of a Person Domiciled in South Africa may be Excluded as Prohibited Immigrants.*

THE FACTS.—After the above decision had been given the points of law reserved by the Immigration Appeal Board, which had itself dismissed the appeal of Latiefa against her classification by the Principal Immigration Officer as a prohibited immigrant, came up for hearing by the Cape Provincial Division of the Supreme Court. Only the following question was fully argued :

> " Whether the Board was correct in ruling that the proviso in sec. 5 (2)(*b*)(i) of Act 22 of 1913 applies where the former ' wife ' had not been introduced into the Union or a Province as an immigrant."

It was common cause that Latiefa would have been lawfully entitled to enter the Union under the Immigration Act, as the wife of a person already domiciled there, save for the proviso in sec. 5 (2)(*b*)(i) above mentioned. This reads :

> " Provided that no woman shall be deemed to be the wife of that exempted person—
>
> (i) if he entered into a marriage or such a union as aforesaid with any other woman who is still living and who resides or is entitled to reside in any Province or whom an immigration officer recognised as his wife under the said para. (*g*)."

For the appellant it was submitted that " on a proper construction of the relevant sections an exempted person is allowed to bring into the Union one wife to whom he is married according to the tenets of an Indian Religion ; and that to this the terms of the proviso constitute no bar when the party to the prior marriage or union was a woman who had not been introduced into the Union pursuant to the provisions of secs. 5 (1)(*f*) and (*g*) and 5 (2)(*b*) of the Act ". It was not contested that Harneker's previous wife, Janap Khan, had always been resident in South Africa, and, therefore, she was not a person " introduced " into the Union under the Act.

Held (*per* Ogilvie Thompson J. ; Broeksma A.J. concurring) : that the appellant's contention must be dismissed, and the ruling of the Immigration Board upheld. For the purposes of

Case No. 89 *Contd.* the Act and its provisos Latiefa could not, in law, " be deemed to be the wife " of Harneker pursuant to secs. 5 (1)(*g*) and 5 (2)(*b*) of the Act. The Judge said :

" The arguments were based on the major submission that the general scheme . . . [of the Act], when read in the light of the prior history of this Legislation, is to entitle a man exempted under sec. 5 (1)(*f*) of the Act to introduce into the Union one ' wife ' to whom he is married according to the tenets of an Indian Religion. In my judgment that proposition is not correct. . . ." The Judge then summarized the history of the Immigration Act, and pointed out the growing stringency of its provisos. He continued : " It is by these later provisos that Harneker's right to introduce the appellant into the Union is conditioned, and the Court must give effect to the plain words of the Statute. In terms of the above-cited first proviso, appellant cannot be deemed to be the ' wife ' of Harneker if the latter ' entered into a marriage or such a union as aforesaid with any other woman who is still living and who resides or is entitled to reside in any Province or whom an immigration officer recognised as his wife under the said para. (*g*).'

" Save perhaps in respect of a possible ambiguity presently to be mentioned, there is, in my judgment, no difficulty in ascertaining the meaning of the above-cited words. In particular, the phrase ' any other woman who is still living ' is, in my opinion, of general application and is not restricted to a woman who has previously been introduced as a ' wife '. . . .

" The possible ambiguity indicated above is whether, on a proper construction of this proviso, the bar contained in the words ' or whom an immigration officer recognised as his wife under the said para. (*g*) ' obtains only while the woman so recognised is ' still living ' ; or whether, once such recognition has been made, the bar against introducing another ' wife ' is perpetual. I favour the former view ; but a decision on that point is not vital to the present case since Janap Khan is admittedly alive and on the facts it is not claimed that she is a woman ' whom an immigration officer recognised ' as the wife of Harneker under para. 5 (1)(*g*). . . .

" Applying the foregoing—that is to say, the ordinary grammatical meaning of the proviso—to the facts of the present case, the position is that Harneker had ' entered into a marriage or such a union as aforesaid ' with Janap Khan who is ' still living and who resides ' in the Province of Natal. The wording of the proviso is thus fully satisfied, with the consequence that appellant may not in law ' be deemed to be the wife ' of Harneker pursuant to secs. 5 (1)(*g*) and 5 (2)(*b*) of the Act."

[Report : [1951] (2) S.A. 589 [C].]

NOTE.—An example of a case where the Courts have intervened in immigration proceedings, despite the provisions of sec. 3 (1) of

Act 22 of 1913, *supra*, is to be found in *Mohamed* v. *Principal Immigration Officer* ([1951] (3) S.A. 884 [C]). Mohamed had been declared a prohibited immigrant, in terms of Act 22 of 1913, by the Principal Immigration Officer at Cape Town. He appealed to the Immigration Board and, in April 1947, the latter found on the evidence before it that Mohamed had been born in South Africa, was lawfully domiciled in the Cape Province, and, therefore, not subject to any order made under the Act. The Principal Immigration Officer thereupon requested the Board to reserve a question of law for decision by the Supreme Court, but finally dropped these proceedings and served a fresh notice on Mohamed, declaring him to be a prohibited immigrant, and granting him a temporary permit to remain in the Union. Mohamed once more appealed to the Board, but was a day late in filing his petition, under the provisions of the Immigration Act. The Board therefore *held* that it had no power to hear the appeal.

Mohamed now applied to the Supreme Court for an order declaring the prohibition notice served on him to be invalid on the ground, *inter alia*, " that the decision of the Appeal Board of April, 1947, was final and conclusive, and that the Principal Immigration Officer could not serve him with a fresh prohibition notice without such decision of the Board having been first set aside ". The Principal Immigration Officer claimed that the Court had no jurisdiction to hear the petition, because of sec. 3 (1) of the Immigration Act.

The Supreme Court *held* that the petition should be granted, and the order declared invalid. One of the reasons given for the decision was that the judgment of the Board, to the effect that Mohamed was not an immigrant, was *res judicata*. As the Principal Immigration Officer had not attempted to have this decision set aside he was acting without jurisdiction, having no such authority under the Act, when he served the second notice on the petitioner.

Another example of the circumstances in which the Court would have jurisdiction in proceedings under Act 22 of 1913 is *Hoosain* v. *van der Merwe, N.O., and Others* ([1953] (3) S.A. 535 [C]). In this case, van Winsen J., delivering the judgment of the Cape Provincial Division of the Supreme Court, stated that if the Immigration Appeal Board, when requested by any of the parties to the proceedings to reserve a question of law for decision by the appropriate Court in terms of sec. 3 (1) of the Act, unlawfully refused to do so, a writ of *mandamus* would issue from the Court to compel the Board to do its duty. He *held*, however, that a Regulation made under the Act, prescribing a time-limit in which notice must be given of any request for the reservation of a question of law, was not *ultra vires* the Act ; and that the Board was not acting illegally in refusing to reserve a question of law, on behalf of a person declared to be a prohibited immigrant, when that person failed to request such reservation within the time-limit prescribed by the Regulation. He *held*, further, that where the Immigration Appeal Board has jurisdiction to decide that an applicant is a prohibited immigrant, and such decision is wrong in law, the only way in which the Court can intervene is " if a question of law is reserved by the Board in such a way as to enable the Court to rule on the correctness of the decision of the Board ".

Aliens—Position of—Security for Costs.

See Case No. 23 (*Massip* v. *Cruzel*).

III.—Expulsion of Aliens

i.—Right of Expulsion

Case No. 90 **Aliens—Expulsion of—Privileged Aliens—Alien Married to a National—The Law of Belgium.**

OSIS *v.* MINISTER OF JUSTICE.

Belgium, Conseil d'État. July 10, 1951.

THE FACTS.—The complainant was a Latvian national. He was married to a Belgian woman who had retained her Belgian nationality. He had been continuously resident in Belgium since 1934. On December 12, 1950, he was notified of a ministerial order of November 27, 1950, for his expulsion from the Kingdom of Belgium, in pursuance of the Law of September 28, 1939, concerning the status of aliens. This was an appeal against that order. It was contended on behalf of the complainant that the Law of 1939 was not applicable to aliens, seeing that Article 2 of a Law of February 12, 1897, provided that nationals of a country at peace with Belgium, who were married to Belgian nationals and had been continuously resident in Belgium for more than five years, could not be expelled.

Held: that the expulsion order of November 27, 1950, must be annulled. The Court said:

" The Law of September 28, 1939, was intended to supplement the provisions of the Law of October 12, 1918, by the introduction of special sanctions, by giving the Minister of Justice the power to order the expulsion of aliens. The Law of October 12, 1918, imposes certain supplementary obligations on aliens and strengthens the measures of supervision. The Law of September 28, 1939, provides for special measures and formalities relating to the immigration of aliens, in view of the particular political circumstances of the period preceding its coming into force.

" The Law of September 28, 1939, has not abrogated the Law of February 12, 1897. It derogates from that Law only in so far as its provisions are incompatible with those of the Law of February 12, 1897. None of its provisions are incompatible with the retention of the guarantees given to certain aliens by Article 2 of the Law of February 12, 1897."

[Report: *Pasicrisie belge,* (1952), IV, p. 88.]

Aliens—Expulsion of—"*Refoulement*"—Legal Character of. **Case No. 91**

In re WOUDSTRA.

France, Court of Appeal of Amiens. December 4, 1951.

THE FACTS.—The accused was a Dutch national. In July 1947 he had obtained in France a card certifying that he had applied for a residence permit; such a card temporarily serves as a residence permit. In December 1948, however, that card was withdrawn, and he was invited, by a prefectoral decree of "*refoulement*", to leave the country. In 1951 he again entered France. He was in possession of a valid passport, but not of a French visa. By special agreement between France and the Netherlands, Dutch nationals were exempt from visa requirements in France. However, a French Ministerial Decree of January 7, 1949, provided that persons "who had been expelled, or whose residence permit had been withdrawn, on the occasion of a previous residence on French territory" were not entitled to such exemption from visa requirements. Woudstra was accordingly charged with having unlawfully entered French territory.

Held: that the accused must be acquitted. The Court said:

"Penal laws must be restrictively interpreted. A decree of '*refoulement*' is not the same thing as an expulsion decree. Moreover, it was not the residence permit of the accused which was withdrawn, but a card certifying that he had applied for a residence permit. Admittedly such a card temporarily serves as a residence permit. It does not, however, follow that the renewal of such a card is the same thing as the renewal of a permit. Accordingly, Woudstra, a Dutch national, who was exempt, as such, from visa requirements, was entitled to enter France after the withdrawal of his card with a national passport without a French visa for the purpose of a stay of less than three months."

[Report: *Sirey, Jurisprudence*, 1952, II, p. 153.]

Aliens—Expulsion of—Grounds for—Immoral Conduct of Alien. **Case No. 92**

Re TH. AND D.

Egypt, Conseil d'État. March 16, 1953.

THE FACTS.—The applicants, a married couple of Greek nationality, appealed against an order of expulsion on the ground that it was contrary to the Decree-Law of June 22,

Case No. 92 *Contd.* 1938, concerning the expulsion of aliens. This Decree purported to give effect to a declaration by the Egyptian Government of May 8, 1937, which included the following statement :

> " The abolition of the capitulations implies the abolition also of all restrictions upon the right of the Royal Egyptian Government to expel aliens from the territory of Egypt. However, the Government does not propose during the transitional period to exercise its right of expulsion with regard to any alien justiciable by the Mixed Tribunals who has resided in Egypt for at least five years, nor to refuse admission to Egyptian territory to those who have temporarily left it except in the following cases. . . ."

The two persons concerned in the proceedings had lived in Egypt since birth without interruption. It appeared that the reason for the expulsion order was that one of the applicants (the husband) was living in concubinage with the wife of a third party who in turn was living with the other applicant (the wife).

Held: that the applications must be dismissed. " Article 2 (2) of the Decree-Law of June 22, 1938, enumerates amongst the grounds justifying expulsion the fact of having committed an act contrary to public morality, and the applicants have undoubtedly committed such an act, an act which is against divine as well as human law ; if the expulsion is based upon this ground it is certainly justifiable in law. The Decree of June 22, 1938, ceased to have effect at the expiration of the transitional period on October 15, 1949 ; on that date the Egyptian Government recovered all its sovereign rights in so far as the expulsion of aliens is concerned, without being subject to interference in this respect so long as there is no abuse of power or violation of the law. Article 10 of the Law of June 10, 1940, concerning passports and the residence of aliens, although it grants to every alien the right to reside in Egypt if he obtains a permit from the competent authorities, does not mean that the right of the Government to expel an alien was restricted during the transitional period if during that period the alien committed an act deemed to be contrary to public morality as expounded above. The opinion of writers on international law is unanimous in recognising that the misconduct or bad conduct of an alien is a valid ground justifying expulsion."

[Report : *Revue égyptienne de Droit international,* 9 (1953), p. 139.]

Aliens—Expulsion of—Alien Classified as a Prohibited Immigrant—Whether Onus Lies on the Alien to Prove that He is not a Prohibited Immigrant—The Law of South Africa. **Case No. 93**

KHAN *v.* PRINCIPAL IMMIGRATION OFFICER.

South Africa, Supreme Court, Appellate Division.
(Centlivres C.J.; Schreiner, van den Heever, Hoexter and Fagan JJ.A.)
December 10, 1951.

THE FACTS.—On April 14, 1950, Khan was notified by the Immigration Officer at Cape Town that he had been classified as a prohibited immigrant, in terms of Act 22 of 1913, and that permission for him to remain in South Africa was refused. Khan immediately petitioned the Immigration Appeal Board, claiming that he was not a prohibited immigrant as he had been born in the Cape Province of the Union, where he had lived all his life. He produced a birth certificate which purported to show that he was born in Cape Town on July 8, 1920. The Board, however, were not satisfied by this, and dismissed the appeal on the ground that Khan " has failed to satisfy us that he is the person mentioned in the birth certificate ". Nevertheless, at his request the Board reserved three questions of law for decision by the Cape Provincial Division of the Supreme Court. These read:

" 1. Whether the Board did not place a heavier *onus* on the appellant than that prescribed by sec. 23 (1) of Act 22 of 1913.

" 2. Whether any reasonable man could have come to the conclusion that appellant had not discharged the *onus*, as prescribed by sec. 23 (1) of Act 22 of 1913, of proving that he had not entered or remained in the Union or Cape Province in contravention of the said Act 22 of 1913.

" 3. Whether in view of the fact that the Principal Immigration officer sought to have the appellant declared a prohibited immigrant as defined by sec. 4 (1) (*a*) of Act 22 of 1913 as amended, there was any evidence at all before the Board to justify his being so declared a prohibited immigrant more particularly in that there was no evidence to establish that the appellant was ' any such person . . . who enters or has entered the Union ' as provided by sec. 4 (1) of Act No. 22 of 1913."

The Court answered all three questions against Khan, who then appealed to the Appellate Division of the Supreme Court.

Held: that the appeal must be dismissed. The Immigration Act placed the onus of proving that he was not a " person who has entered or remained in the Union in contravention of the Act " on the person so charged, and Khan had failed to establish the contrary.

Case No. 93 ***Contd.***

I. *Nature of the Onus Placed on a Prohibited Immigrant to Prove that He Has Not Entered or Remained Illegally in the Union.*

The Court said (*per* Fagan J.A.) :

" Sec. 23 (1) of the Act (Act 22 of 1913) reads :

' The burden of proving that a person has not entered or remained in the Union or any Province in contravention of this Act shall lie upon such person.'

" The impression one gets from a reading of the appellant's grounds of appeal to the Immigration Board is that his only reply to the allegation that he fell under sec. 4 (1)(*a*) was to plead that he was exempted by the provisions of sec. 5 (*e*)—which exempts persons born in the Union of parents domiciled there—and of sec. 5 (*f*)—which exempts persons domiciled in any Province who are not such persons as are described in paras. (*e*), (*f*), or (*i*) of sec. 4 (1). There can be no doubt, however, that if the appellant was relying on these exemptions, the Board was right in casting on him the *onus* of proving them.

" The main point [for the appellant], however . . . was a different one. Put briefly it was that as the relevant provisions of the Immigration Act do not come into play at all except in respect of *an entry* into the Union, the *onus* in the first instance lies on the Immigration Officer to prove that the person concerned *has entered* the Union, and only when the entry has been established is there an *onus* on that person to show that the entry was not in contravention of the Act.

" It is . . . only a person ' who enters or has entered ' the Union, or a Province in which he is not lawfully resident, who can be declared a prohibited immigrant in respect of the Union or of that Province. But saying that there must be or must have been an entry to bring sec. 4 (1) into play does not settle the question of the *onus* of proving or disproving the entry. It is submitted that sec. 23 (1) imposes an *onus* in only one case, *viz.* where the issue is whether an entry (or remaining) was in contravention of the Act. That . . . presupposes an entry ; it does not deal with the *onus* of proving or disproving an entry ; and that *onus*, therefore, lies on the party who asserts it, *i.e.* the immigration officer.

" But sec. 23 (1) throws on the person affected the *onus* of proving that he ' has not entered . . . in contravention of this Act '. He can prove that by showing that he never entered ; or he can prove it by showing that he has entered legally. That seems to me to be the natural meaning of the words used, and it leaves the whole *onus* on the person alleged to have entered illegally.

" The basic provisions of the Act are secs. 19 (1) and (2).

They deal with: (*a*) every person arriving at any port; and (*b*) every person when otherwise found within the Union.

"'Found' here must mean found by an immigration officer. At the back of (*b*) is the idea that the immigration officer suspects that the person may be a prohibited immigrant; otherwise he would be abusing his powers. But he need not suspect on reasonable grounds. Every person in the Union is liable to be required to appear before an immigration officer and satisfy the latter that he is not a prohibited immigrant. To do so he must satisfy the immigration officer either that he has never entered the Union or that if he did ever enter the Union he was entitled to do so. . . .

"Once he has been declared a prohibited immigrant (either with or without a provisional permit period) he may not enter or remain in the Union. His only means of redress is an appeal to the Immigration Board having jurisdiction under sec. 2. Sec. 23 (1) certainly applies to proceedings before the Immigration Board. . . . The issue to be decided by the Immigration Board is the same issue as the one that the immigration officer had to decide, namely, whether the person is a prohibited immigrant. . . . The decision of the issue depends on—(*a*) whether the person has entered the Union (or was entering at the time he was required to satisfy the immigration officer) and (*b*) whether his entry was legal or illegal. On both these points he had to satisfy the immigration officer. One would expect therefore that when sec. 23 (1) puts the burden of proof on a person who has appealed from the immigration officer, the burden would relate again to both points. It would be surprising if a person found in the Union who was unable to satisfy an immigration officer on points (*a*) and (*b*) could by appealing require the Immigration Department to prove not both (*a*) and (*b*) but (*a*) and not (*b*). One would expect the two points to be treated alike in regard to the *onus*.

"Sec. 23 (1) does not say that the burden of proving that he is not a prohibited immigrant lies upon the person alleged to be such. It uses other words, namely, that the person has not entered (or remained in the Union) in contravention of the Act. But the scheme of the Act . . . being that *any* person who has incurred the suspicion of an immigration officer that he is not (either because he has not entered or because he has not entered illegally) it is natural to suppose that the burden will continue to remain on the person who appeals. Ordinarily an appellant has to show that the order appealed from was wrong, and though the proceedings before the Immigration Board are a more complete rehearing than an appeal in a court of law, it would be anomalous if by the mere act of appeal the appellant were to shift the *onus* that previously rested on him.

"If sec. 23 (1) had been intended to place the *onus* only in regard to point (*b*) on the person suspected it would have been

Case No. 93 *Contd.*

obvious to say something like, ' The burden of proving that a person who has entered or remained in the Union or any Province has not done so in contravention of this Act shall be upon such person '. But on the form of the sub-section the person suspected has the burden of disproving that he has entered or remained in contravention of the Act. . . . In terms the whole issue, covering both points, must be proved in his favour by the suspect. And there is nothing unreasonable in this interpretation, having regard to the relative facilities for proof available to the suspect and the immigration authorities. Indeed once it is clear that the scheme of the Act covers persons found in the Union as well as persons on the point of entering the Union, it is natural that the Act should require the person suspected to justify his presence completely and not only in certain respects. . . .

" [It is submitted that] it would be a hardship, and might lead to unjust decisions, if a person has to prove that he did not enter the country without even having particulars furnished to him of the date or circumstances of the entry alleged. That submission—based on the maxim that if a statute is capable of two constructions the Court will presume that the Legislature did not intend the harsher one—can only help him if the language of sec. 23 (1) is ambiguous, which it does not seem to me to be. But I also do not see the hardship. A man's movements are peculiarly within his own knowledge, and it should be very much easier for him to convince any reasonable body of men—as we must surely presume the Board to be—that he has lived all his life in the country than it would be for the Immigration Department to find out the time and circumstances of a surreptitious entry. I should think it is indeed because personal facts which may make a man a prohibited immigrant are peculiarly within his knowledge and may be very difficult for anyone else to ascertain, that sec. 23 (1) throws the *onus* on the alleged prohibited immigrant ; if so, there seems to me to be nothing for which the need of such a provision would probably have been more strongly felt than a clandestine entry.

" I come to the conclusion, therefore, that the Board, in requiring the appellant to satisfy it that he was the person mentioned in the birth certificate—which was the basis of his assertion that he had been born in the Union and had always lived there, *i.e.* that he had never ' entered it '—was not placing a heavier *onus* on him than that prescribed by sec. 23 (1) ; and the first question was rightly answered against the appellant."

II. *Standard of Proof which may be Reasonably Required of a Person Seeking to Show that he is Not a Prohibited Immigrant.*

" The next question is whether any reasonable man could have come to the conclusion that the appellant had not discharged the *onus*. The information before the Board showed that the appellant had in 1947, when first questioned by an immigration officer, made statements on material points differing from what he was now saying. He had then given only his father's surname, the very common name of Khan. The birth certificate he then produced also had only the father's surname, and gave his race as Indian. The mother's race was given as Malay, but her name was not inserted, and the appellant stated on affidavit : ' I do not know her name. She is dead.' He said his father ' has never been to India since he first entered this country ', which clearly implied that his father had been born in India. The appellant was asked in 1947 to come back the next day to the Immigration Office with his father, but he did not come back, he disappeared, and could not be traced by the police, though they looked for him at the address where he said he was working. In 1950 he produced a birth certificate in identical wording to the one produced in 1947, except that his own christian name had been spelt Mogomat and was now spelt Mogamat—but the Board rightly attached no importance to this difference, which might have been a copying error. But now he said he knew the name of his mother ; it was Gadija. He now also gave his father's christian name, and produced what purported to be his father's death certificate, dated January 1949. In that certificate the race of the deceased was given as Malay and his birth-place as Cape Province. The Department obtained a full birth certificate of the person born at the time and place and of the parents mentioned in the certificates which the appellant had produced ; there the father's birth-place was given as India and his race as Indian. The appellant also said in evidence that his father came from India, he did not know from what part of India. The discrepancies in the certificates are such as might have been explained or might have been disregarded if there had been other convincing evidence, but apparently the Board was not satisfied with the evidence of the appellant and his two witnesses ; their evidence looks somewhat vague and fragmentary if one reads it, and one wonders why a man who says that he was born in Cape Town and lived there all his life and that his father had only recently died there could not produce people who knew and could tell more about him, his earlier years and his family. But the question is not whether we would have accepted that evidence, for the decision of the facts rests with the Board. The question is merely whether no reasonable man could have refused to accept that evidence ; and I cannot say this question, too, was not rightly answered against the appellant.

" The third question—intended to imply that the immigration officer should have produced some positive evidence of an entry into the Union by the appellant—depends on the main

Case No. 93 *Contd.* submission, with which I have dealt in connection with the first question and which I have already answered against the appellant. . . ."

[Report: [1952] (1) S.A. 371 [A.D.].]

NOTE.—The principle that the onus lies on a person declared to be a prohibited immigrant to prove that he is not so was applied in *Kajee* v. *Principal Immigration Officer*, ([1954] (4) S.A. 319 [N]). In this case the appellant, who was classified as a prohibited immigrant in May 1953, once again relied on a birth certificate as proof of the alleged fact that he was born in the Union, but failed to satisfy the Immigration Appeal Board that he was the person mentioned therein, as much of the evidence he produced in support of his contention was of very doubtful validity. There was, however, one point in his favour. Though he appealed to the Board on the sole ground that he was the person mentioned in the birth certificate, he produced in evidence two further certificates, issued to him by the immigration authorities, the one in 1933, the other in 1951. These were certificates of identity, entitling the appellant to re-enter the Union without further proof of his right to do so, after single journeys to India. These certificates expired in July 1936 and May 1954 respectively. From the first of these it appeared that the appellant had, in 1933, satisfied the then Immigration Officer that he had been born in the Union. When the Board rejected the appeal the appellant requested that several questions of law be reserved for decision by the Natal Provincial Division of the Supreme Court. In support of one of these questions it was argued that as Kajee had satisfied the Immigration Officer in 1933 that he was born in Natal, his subsequent residence there became lawful residence, and he gained a domicile in Natal within the meaning of the Immigrants Regulation Act. Therefore he could not be dealt with as a prohibited immigrant in 1953, without proof of fraud on his own part twenty years earlier. The Court rejected this contention. Broome J.P. said: "I can find nothing in sec. 19 (1) [of the Immigrants Regulation Act] which relieves any person who has once satisfied an immigration officer from being required to satisfy an immigration officer again, or which relieves him of the *onus* of proof on such subsequent occasion".

Case No. 94

Aliens—Expulsion of—Executive Discretion—Whether Limited by Constitution—The Law of Mexico.

In re VELASCO TOVAR *ET AL.*

Mexico, Supreme Court. October 3, 1951.

THE FACTS.—*Amparo* was sought by Luís Velasco Tovar and others against action taken by the Secretary of the Interior and the immigration authorities. Petitioners stated that they did not receive a written decision regarding their request for change in immigrant status; instead, the fees paid for this purpose had been returned to them, together with an order for their departure from the country within ten days.

Held: that the petition for *amparo* must be granted. Aliens are entitled to the protection of the individual guarantees established in the Constitution. The judgment is reported in summary form as follows:

"The failure of the appropriate authorities to send a written decision directly to the petitioners regarding the request which they had made in conformity with the law violates the guarantees protected under Article 8 of the Constitution. Where a petition for change in immigrant status has been submitted to the appropriate authorities, it is contrary to law to acknowledge it by sending to the petitioners a carbon copy of an order directing the return of the fees paid by them and notifying them of their expulsion from the country. Action of this kind violates the constitutional guarantees established in Articles 8, 14 and 16.

"The Executive branch of the Government is authorized in pursuance of Article 33 of the Constitution to expel from the country aliens whose presence is deemed undesirable. This provision may not be interpreted, however, to mean that the said aliens can be deprived of their right to enjoy the benefits of those guarantees, granted in Chapter I, Title I, of the Constitution, which require that the order for expulsion be drawn up and transmitted in accordance with established legal procedure.

"The despatch of a carbon copy of the decision to these aliens does not satisfy the requirement of Article 8 of the Constitution that the authorities must send a written reply to a petitioner as soon as possible."

[Report: 110 *Semanario judicial de la Federación* (5a Época), Part 1, p. 112.]

Deportation—Position of Alien Declared to be a Prohibited Immigrant—Lawfulness of Detention Prior to Deportation—Whether Alien has Right of Access to Persons Outside Place of Detention—The Law of South Africa.

See Case No. 89 (*Harneker* v. *Gaol Superintendent*).

Aliens—Expulsion of—Right of Asylum—The Law of Kenya.

See Case No. 80 (*Abdou* v. *Attorney-General of Kenya*).

ii.—Procedure of Expulsion

Case No. 95 **Aliens—Deportation of—Procedure of—Detention Pending Deportation—Form of Deportation Order—Whether Alien may Leave Voluntarily Choosing Transport and Destination—Aliens Order, 1920.**

REX *v.* GOVERNOR OF H.M. PRISON AT BRIXTON AND THE SECRETARY OF STATE FOR HOME AFFAIRS.
Ex Parte SLIWA.

England, Court of Appeal.
(Singleton, Birkett and Romer L.JJ.)
December 20, 1951.

THE FACTS.—This was an appeal from an order by the Divisional Court by which a motion for a writ of habeas corpus, on behalf of Sliwa, an alien, was refused.

An order was made on October 6, 1950, that Sliwa be deported from the United Kingdom, and this was followed by directions for his detention meanwhile. It was served upon him on September 28, 1951, and the applicant was thereupon detained in custody. The Divisional Court refused a motion for habeas corpus and the applicant appealed. The ground of his appeal was that the deportation order, which, with a slight variation, was in the form used since the Aliens Restriction (Consolidation) Order, 1916, was not good when made under the Aliens Order, 1920. In the Order of 1920 there had been a change of wording. Article 12 (1) gave the Secretary of State power to make an order " requiring an alien to leave and to remain thereafter out of the United Kingdom ". The applicant argued that this meant that he must be given an opportunity to leave voluntarily and to choose his transport and destination. He also argued that since the deportation order did not use the words " require you to leave " it was not valid.

Held: that the appeal must be dismissed ; the deportation order was good and the detention lawful.

The Court said (*per* Singleton L.J.) : " Article 12 (1) of the Aliens Restriction (Consolidation) Order, 1916, was considered in *Rex* v. *Secretary of State for Home Affairs ; Ex parte Duke of Château-Thierry* ([1917] 1 K.B. 552). Lord Reading C.J. said (*ibid.* 556) : ' But he [the alien] must have the opportunity of leaving this country when the order for deportation is made, and he may go to any country he pleases.' In the Court of Appeal ([1917] 1 K.B. 922) a different view of the order was taken ; see the judgments of Swinfen Eady L.J. (*ibid.* 931), of Pickford L.J. (*ibid.* 933), and of Bankes L.J. (*ibid.* 936–7). I cite a short passage from the judgment of Pickford L.J. (*ibid.* 933–4) : ' The Secretary of State has two courses open to him.

If he considers it safe to leave the alien at large he may rest himself only on subsection (1), and then it seems to me the alien is at liberty to choose his ship and his destination. If, on the other hand, he considers it right that the alien should not be left at large, he may act under subsection (2) and detain him as therein provided.'

" In 1919 there was a change made in article 12 (1), and that change was maintained in the Order of 1920, which is now in force, and under which the Secretary of State acted in the present case : ' (1) The Secretary of State may, if he thinks fit, in any of the cases mentioned in this article make an order (in this Order referred to as a " deportation order ") requiring an alien to leave and to remain thereafter out of the United Kingdom. (2) An order made under this article may be made subject to any condition which the Secretary of State may think proper. (3) An alien with respect to whom a deportation order is made shall leave the United Kingdom in accordance with the order, and shall thereafter so long as the order is in force remain out of the United Kingdom. (4) An alien with respect to whom a deportation order is made . . . may be detained in such manner as may be directed by the Secretary of State, and may be placed on a ship about to leave the United Kingdom, and shall be deemed to be in legal custody, whilst so detained, and until the ship finally leaves the United Kingdom.' Then by clause (6) : ' A deportation order may be made in any of the following cases . . . (*c*) If the Secretary of State deems it to be conducive to the public good to make a deportation order against the alien.' It will be seen at once that the wording of article 12 (1) differs from the wording of the Order of 1916. The Secretary of State may make an order requiring an alien to leave and to remain thereafter out of the United Kingdom. The order he makes is still referred to as a ' deportation order '.

" It is a little surprising that, notwithstanding the change in article 12 (1), the form of order used by the Home Office has remained just as it was before, apart from an alteration made consequent on the judgment of Bankes L.J. in *Rex* v. *Secretary of State for Home Affairs ; Ex parte Bressler* (131 L.T. 386–7). The order in the present case is an order that Pawel Sliwa shall be deported from the United Kingdom, followed by directions for his detention meanwhile. Clause (6) of article 12 sets out the cases under which an order may be made, and this fell under (*c*) : ' If the Secretary of State deems it to be conducive to the public good to make a deportation order against the alien'.

" Great importance was attached by Mr. Weitzman to the change in the form of article 12 (1). He submitted that as it now stands (*a*) it presupposes a document or notice addressed to the alien ; and (*b*) it is intended to give the alien an opportunity to leave the United Kingdom voluntarily on receiving that document or notice. There is some force in this argument,

Case No. 95 *Contd.*

but I feel that it does not pay sufficient regard to article 12 (4), under which an 'alien with respect to whom a deportation order is made . . . may be detained in such manner as may be directed by the Secretary of State and may be placed on a ship about to leave the United Kingdom, and shall be deemed to be in legal custody whilst so detained . . .'. There is no reason why the Secretary of State should not use article 12 (1) and article 12 (4) together if he thinks fit so to do. In other words, once an order is made under article 12 (1) the Secretary of State may direct detention of the alien under article 12 (4). Virtually the power of the Secretary of State is just the same as it was under the Order of 1916, though the wording of article 12 has been changed. In practice the alien is (if the Secretary of State thinks it right) given an opportunity to leave. The order in this case was made on October 6, 1950, and clearly the alien knew of it. That is shown by a letter dated September 20, 1951, exhibited to the affidavit of Mr. Karpinski, and the letter from the Home Office of the same date similarly exhibited. In each of those letters there is a reference to a deportation order which has been made. The alien in fact applied for a passport at the Polish Consulate in December, 1950, as paragraph 7 of his affidavit shows. The order was not served on him until September 28, 1951. Thus the position of the alien is just the same as it would have been if the order had been in the terms in which Mr. Weitzman submits that it ought to have been, in order to comply with article 12 (1). It is not in so many words directed to the alien, but it names him, and it was served on him ; it is an order and makes it clear what is required ; the latter part of it contains provision as to his detention meanwhile, and the facts deposed to by the alien and his legal adviser would seem to show that he was given an opportunity to make arrangements for his departure from this country, though, as I have said, I do not consider that the Secretary of State was bound to allow that.

"The objection raised is a technical one, based on the wording of the order. It is none the worse for that, if it is sound. I think it fails, and I state my reasons shortly : 1. That which the Secretary of State is empowered to do is to make an order as distinguished from a request. 2. An order requiring a person to leave envisages compelling him to leave. The Secretary of State can thus make an order which compels the alien to leave. Whatever else can be said about the order, it is clear upon that point. 3. No special form of order is provided for use. That which was served was headed 'Deportation Order' (*vide* article 12 (1)), and the powers under which it was made are set out. 4. I do not think that there is any more substance in the argument that under the Order of 1920 the alien *must* be given an opportunity to leave than there was in that addressed to the court under the Order of 1916 in *Rex* v. *Secretary of State for*

Home Affairs ; Ex parte Duke of Château-Thierry ([1917] 1 K.B. 922, 927). To my mind clause (4) of article 12 disposes of that.

" I am in favour of dismissing the appeal."

Per Birkett L.J. : " In the ordinary way I should have been content to express my agreement with the judgment that has just been delivered, but as the appeal is concerned with the liberty of a foreigner who alleges that he has particular reason to fear being deported to Poland, quite briefly I will state my own views." His Lordship then summarized the argument of the applicant, and continued :

" As my Lord has pointed out, the Order of 1920 has been in force for over 30 years, and the order of October 6, 1950, followed the form which has been used throughout that period. It seems to me to be of importance to observe that the powers of the Secretary of State under both the Order of 1916 and the Order of 1920 to order the alien to be detained in custody until he can be placed upon a suitable ship and deported are substantially the same, although there is a slight difference in the wording. If, for example, the words ' requires you to leave ' had been in the order of October 6, 1950, the Secretary of State could have ordered the detention of the alien immediately on the service of the order, and the alien could have been kept in custody until placed on board a suitable ship. This seems to be opposed to the view for which Mr. Weitzman contends that the wording of the Order of 1920 was in the nature of a request to leave addressed to the alien. I must say I think it unfortunate that in a matter of such very great moment as a man's liberty, it should be possible for a point of this kind to arise, so that Slade J., one of the judges in the Divisional Court, should have thought it imperative to put on record the doubts and difficulties he felt in concurring in the decision. Upon careful consideration of the whole matter I am of opinion that the order of October 6, 1950, was a valid order. I do not think that the Order of 1920 by the change in language gave to the alien the opportunity to leave the country of his own accord, as Mr. Weitzman contended, and only thereafter was the power of deportation to be exercised. I do not think that the absence of the words ' I require you to leave ' from the order of October 6, 1950, makes the order invalid, nor do I think the presence of the words ' shall be deported ' does so either.

" I think that the Secretary of State, exercising his powers under article 12 (6)(*c*) of the Aliens Order, 1920, which gave him power to make a deportation order if he deemed it to be conducive to the public good, was not bound to use the words ' I require you to leave ', but by ordering the deportation of the alien made an order which required the alien to leave."

Romer L.J. said : " I agree with the judgments which have just been delivered, and there is nothing I wish to add."

[Report : L.R. [1952] 1 K.B. 169.]

Case No. 96 **Aliens—Expulsion of—Review by Judiciary—Executive Discretion—The Law of Belgium.**

GINTER *v.* MINISTER OF JUSTICE.

Belgium, Conseil d'État. June 29, 1951.

THE FACTS.—By order of August 23, 1949, notified to the appellant on September 1, 1949, the Minister of Justice called upon the appellant to leave the Kingdom of Belgium. The order referred to a Law of September 28, 1939, which provided for the expulsion of aliens whose presence was deemed to be harmful or dangerous for the safety or economy of the country, but did not state for which of these reasons the expulsion of the appellant was considered necessary. The appellant now contended that in making the order the Minister exceeded his competence, since his presence in Belgium was not, as required by the law, harmful or dangerous for the safety or economy of the country.

Held: that the ministerial order must be annulled. The Court said:

" Article 1, paragraph 2, of the Law of September 28, 1939, provides that 'aliens whose presence is deemed to be harmful or dangerous for the safety or economy of the country may be expelled by the Minister of Justice'. The Conseil d'État cannot substitute its judgment for that of the competent Minister for the purpose of deciding whether the presence of an alien is harmful or dangerous for the security and economy of the country. At the same time it can verify whether the Minister found that one of the conditions provided for in Article 1 (2) of the Law was satisfied. The validity of an expulsion order is dependent on a finding of the existence of one of these conditions by the Minister himself.

" Neither the text of the order nor the documents submitted by the opposing party show that the Minister actually determined that the presence of the appellant was harmful or dangerous for the security or economy of the country. The order merely refers to the Law of September 28, 1939, without mentioning one of the conditions legally justifying expulsion under Article 1 (2) thereof. None of the documents submitted enables us to decide whether the Minister found one of these conditions was satisfied, or whether he ordered the expulsion on the basis of the opinion of the aliens department (*police des étrangers*) : ' the aliens department consider that Ginter is not worthy of residence in the country, and that he should properly be in France where he is liable to account for his behaviour under the occupation '."

[Report : *Pasicrisie belge,* (1952), IV, p. 66.]

Aliens—Expulsion of—Deportation—Right to Choose Place of Deportation—The Law of Argentine. **Case No. 97**

In re GUERREIRO *ET AL.*

Argentina, Supreme Court. November 27, 1951.

THE FACTS.—Guerreiro, a Portuguese national, and Theodolou, a British national, were detained by the Argentine authorities for expulsion under the terms of Article 4 of Law 4144 concerning the expulsion of aliens. The appellants sought to go to Hungary rather than to return to their respective countries. When Portuguese and British consular officials refused to release their passports so that they could obtain the necessary Hungarian visas, the appellants applied to the Argentine authorities for travel documents, as provided by Article 1 of Decree No. 8630/49. The appellants sought their release from detention on a writ of habeas corpus. The case came before the Supreme Court by extraordinary appeal.

Held: that the request for a writ for habeas corpus must be denied. An alien under an order of expulsion does not have a right of option as to the country to which he is to be sent. The Court said in part:

" We cannot admit the contention that the protection of the individual afforded by the writ of habeas corpus extends to the grant of a right of option by an alien as to the country to which he is to be expelled. Such an interpretation would constitute a unilateral restraint upon the power of the Executive Branch to adopt such measures as may be deemed necessary to assure public peace and tranquillity [1] and would thereby establish a condition foreign to the intention of the law."

[Report: 221 *Fallos de la Corte Suprema*, p. 265.]

D—EXTRADITION

I.—In General

Extradition—In General—Request for Extradition in Absence of Treaty—General Principles of International Law—Bustamante Code—The Law of Chile. **Case No. 98**

In re MUZZA ACEITUNO.

Chile, Supreme Court. April 3, 1951.

THE FACTS.—The Supreme Court was asked, pursuant to the provisions of the Code of Criminal Procedure, to determine

---

[1] See *In re De Mysliwiec*, 218 *Fallos de la Corte Suprema*, p. 769.

Case No. 98 *Contd.* whether a request might be directed to Argentina for the extradition of Ricardo Muzza Aceituno, a Chilean national, on charges of homicide and fraud (*giro doloso de cheque*). There was no extradition treaty between the two States.

Held: that the request for extradition could properly be made. In the absence of a bilateral treaty of extradition, extradition proceedings are governed by the principles of international law embodied in multilateral agreements. The Court said in part :

" In order to determine whether the extradition request may proceed, it is necessary not only to take into consideration the provisions of our procedural law pertinent to the matter, but particularly to establish whether there is an extradition treaty in force between Chile and Argentina.

" As the Fiscal has pointed out in his opinion, there is no extradition treaty in force between Chile and the Argentine Republic. In the absence of a treaty with Argentina, which is the country where the fugitive is understood to be residing, it must be determined whether the principles of international law concerning extradition are applicable in this case.

" Chile and Argentina, among other States, were party to the Convention on Extradition concluded at the Seventh Pan-American Conference on December 26, 1933. According to Article 1 of the Convention, the Signatory States agree to deliver to any of the other States so requesting, persons found in their territory who have been charged with or convicted for any act having the character of an offence according to the laws of the demanding and asylum States, and punishable by a minimum penalty of imprisonment for one year. Article 5 (b) of the same Convention provides that where the fugitive has not yet been convicted, the extradition request must be accompanied by an authenticated copy of the order for detention issued by a competent authority. This requirement has been complied with in the instant case as the Judge has found that Muzza is a fugitive and has issued an order for his detention. Furthermore, it may be pointed out that the stipulations of this Convention conform to provisions of the Code of Private International Law (Bustamante Code)(Articles 344–381, particularly Articles 352, 353, 354, 359, 364 and 365), which was signed by both Chile and Argentina, although not ratified by the latter State.

" The provisions of the Bustamante Code and the Pan-American Convention on Extradition of 1933 have the character of principles of international law. It follows, then, with reference to both the above analysis and the opinion of the Fiscal, that the extradition request as formulated by the Judge of Santa Cruz is in conformity with the principles of international law which control in a situation where there is no treaty with the asylum State ; therefore, the request meets the requirements of Article 637 of the Code of Penal Procedure.

" In regard to the charges against the fugitive, the offence of homicide is punishable by penalties ranging from imprisonment for five years and a day to death (Article 391 of the Penal Code) while the offence of fraud (*giro doloso de cheque*) is punishable by imprisonment from 541 days to five years (Article 22 of Law No. 7498 on Current Banking Accounts and Cheques ; Article 467 of the Penal Code). Both offences are similarly recognized as crimes in Argentine law. Criminal proceedings are not void by reason of lapse of time as the first delict was committed in September 1949, and the second subsequent thereto."

[Report : *Revista de Derecho, Jurisprudencia y Ciencias sociales y Gaceta de los Tribunales*, 48 (1951), sec. IV, p. 48.]

Extradition—In General—Absence of Treaty of Extradition—Reciprocity—The Law of Venezuela. **Case No. 99**

In re DILASSER *ET AL.*

Venezuela, Federal and Cassation Court. March 27, 1951.

THE FACTS.—France requested the surrender of Dilasser, a French national, and Belostoski, alias Beleau, a native of Russia, on charges of swindling and being an accessory to the act, respectively. In the absence of a treaty between the two States, the extradition request was based on the principle of reciprocity. The defendants sought a rehearing on the charges but were refused by the Federal Chamber on the ground that there was no cause for such a proceeding.

Held : that the request for extradition must be granted. In the absence of a treaty between the parties, extradition could be granted on the basis of reciprocity. The Court found that the fugitives were wanted for extraditable offences and stated that where the procedural requirements of Venezuelan law had been satisfied, extradition could proceed in the absence of a specific treaty between the parties on the subject because Article 389 of the Penal Code provides that " extradition shall be granted not only in conformity with norms established in public treaties but also in accordance with the principles of international law ".

[Report : *Gaceta forense*, Año II, No. 7 (April 1952), p. 156.]

Extradition—In General—Whether Governed by Generally Recognized Principles of International Law—Extradition in Absence of Treaty.

See Case No. 109 (*State* v. *Tapley*).

III.—Conditions of Extradition. Extraditable Crimes

Case No. 100 **Extradition—Conditions of—Crime Committed in Territory of Requesting State but Outside its Effective Jurisdiction—Effect of Presence of Enemy Troops Upon Municipal Criminal Jurisdiction.**

In re LoDolce.

United States, District Court, Western District, New York. August 11, 1952.

The Facts.—The Republic of Italy sought the extradition of LoDolce, an American citizen, from the United States to Italy, to stand trial on charges of having murdered and robbed his commanding officer while on a mission behind the German lines in Italy in 1944. The Court accepted the fact of the murder and robbery, and noted that these crimes were among those for which extradition may normally be demanded pursuant to the Treaty of 1868 between the United States and Italy. However, it was

Held: that since LoDolce was not amenable to the laws of Italy in 1944 in respect of a crime committed in territory which at the material time was not under the effective jurisdiction of Italy, extradition could not be granted. The Court said :

" At the time of the commission of the alleged crimes in 1944, a state of war existed between the United States and Germany. It cannot be disputed that at that time a state of war also existed between the United States and Italy. The military hostilities between the United States and Italy had been suspended by the armistice. As defined by the United States army in its Basic Field Manual, Rules of Land Warfare, Rule 253, ' An armistice is not a partial or a temporary peace ; it is only the suspension of military operations to the extent agreed upon by the parties '. See also Webster's Dict. and Hague Peace Convention, Art. 36. An armistice does not mean a conclusion of war. It is a step intended to lead to a treaty of peace. From time to time following the armistice agreement, steps looking to the removal of many things hampering the Italian people were taken. The duties of the Control Commission, which was established to supervise the terms of the armistice, were gradually lessened until it was largely removed. On September 15, 1947, a treaty of peace between the United States and the Republic of Italy became effective, 47 Stat. 1245.

" The claim as made by the complainant is that the grant of the directive by the Secretary of State is not a ' ministerial act ', but an act of discretion, and that ' the only conclusion possible is that the State Department has concluded that the accused in the instant case has committed a crime within the jurisdiction of Italy and is not exempt from the judicial jurisdiction of that country '. No merit is seen in this claim. In the first place any such conclusion is denied in the instant case by the letters to Congressmen written by the Department of State. Further the practice for extradition is governed by 18 U.S.C.A. § 3184 where the Secretary of State submits the matter for determination by the Court in the first instance. The Court's decision denying extradition is not reviewable, while a decision granting a certificate is. The directive from the Department clearly shows that the function of the Secretary of State in the first instance is to submit the entire matter to the Court. The concluding clause of the directive reads :

> ' Now, Therefore, to the end that the above-named officers, or any of them, may cause the necessary proceedings to be had, in pursuance of said laws, *in order that the evidence* of the criminality of the said Carl George LoDolce *may be heard and considered*, and if deemed sufficient to sustain the charges, that the same may be certified, together with a copy of all the proceedings, to the Secretary of State . . .' (Emphasis mine.) See *In re Lucke*, D.C., 20 F. Supp. 658, and cases cited.

" As was said in part in letters to the various Congressmen,

> ' In view of the fact that this Department is charged by law with the duty of reviewing these extradition cases in which an extradition magistrate finds that a proper case for surrender has been made out under the treaty, the Department carefully avoids expressing any views concerning the case prior to its receipt from the extradition magistrate.'

" It is true that where it is clear that the individual sought does not come within the Treaty provisions for extradition, the Department of State may deny extradition without submission to any court or commissioner. Harvard Research Int. Law, Extradition, 29 American Journal Int. Law, supp. 166 et seq. The Department has not waived its right to claim immunity. The case cited by the complainant from Hackworth Digest of International Law, Vol 4, p. 94, was one in which extradition was denied by the Department because the offense had been

Case No. 100 *Contd.*

committed in the United States and the individual or person sought had been convicted here. The distinction is clear.

" Pursuant to the directive in sequence, this Court issued a warrant for the apprehension of Carl George LoDolce ; LoDolce was thereupon arrested and brought before this Court ; the Italian Government was represented by counsel ; LoDolce was represented by counsel ; hearing was had, proof was adduced, arguments were made and briefs were filed. The matter was finally submitted on July 1, 1952.

" After examination and study of the many valuable briefs together with the cited cases and the exhibits, as well as further independent research, there seems to be one question for determination. The place of the commission of the alleged crimes has been determined and admitted as being in the northern part of Italy many miles behind the enemy line as then held by the German army. We then come to the vital question with respect to the application of the treaty between the United States and the Republic of Italy, effective September 15, 1947, which the demanding government claims revitalized the Extradition Treaty of 1868 and made it retroactive.

" The Treaty of Extradition of 1868 between Italy and the United States is still in force. The Treaty of Peace with Italy, effective September 15, 1947, provided that the Allied or Associated Power would notify Italy which of the pre-war bilateral treaties it desired to keep and by note dated February 6, 1948, the Department of State listed the Treaty of 1868 as one which it desired to keep in force. See Treaty of Peace, Article 44. It is believed that this Treaty is retroactive. *United States ex rel. Oppenheim* v. *Hecht*, 2 Cir., 16 F. 2d 955 ; *In re Di Giacomo*, Fed.Cas.No.3,747, 12 Blatchf. 391.

" The preamble to the 1868 Extradition Convention reads :

> ' The United States of America and . . . King of Italy, having judged it expedient . . . that persons convicted of or charged with the crimes hereinafter specified . . . should . . . be reciprocally delivered up, . . .'

" Article I, in part, provides that the respective governments :

> ' mutually agree to deliver up persons who, having been convicted of or charged with the crimes specified . . .'

" And Article II, in part, provides :

> ' Persons shall be delivered up who shall have been convicted of, or be charged, according to the provisions of this convention, with any of the following crimes : . . .'

" The crime of murder charged here is one of the crimes included in the Convention. . . .

"It may be true that the Italian government had not lost to Germany and the United States its sovereignty over the boundaries which it occupied prior to the war, yet while any of the enemy armies were within such boundaries, with or without the consent or permission of Italy's government, such presence may justly be considered as committing an act of hostility and certain of its rights were given up, ceded, severed or abandoned by that sovereign for the time. *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 139–140, 3 L. Ed. 287; *United States* v. *Rice*, 4 Wheat. 246, 4 L. Ed. 562; *Coleman* v. *Tennessee*, 97 U.S. 509, 515, 517, 24 L. Ed. 1118.

"The opinion of Mr. Justice Field in *Coleman* v. *Tennessee*, 97 U.S. 509, 24 L. Ed. 1118, cited and discussed by both petitioner and respondent, must be considered. Since the decision in the Coleman case, it seems to be necessary to read, re-read and study that opinion before a determination is made of any extradition matter. The opinion is far-reaching and is filled with carefully and thoughtfully expressed words and sentences which have been put in such clear, unmistakable and simple language that the exact meaning cannot be confused. The opinion long since has been and still is a basic part of the military law and rules. To emphasize the particular point at hand for the moment, quotation from the opinion will be made, but, the opinion should be considered as a whole to learn the solid foundation for the applicable quoted excerpts.

"In *Coleman* v. *Tennessee*, *supra*, Coleman was a regular soldier in the military service of the United States. He was a member of the Union army occupying the State of Tennessee during the war between the states. He was charged with the murder of one Mourning Ann Bell while a member of the army of occupation in Tennessee. He had been tried by general court martial. Later he was indicted for the same crime in the District Court of Knoxville, Tennessee. The Supreme Court, by its decision, required the prisoner to be discharged from the custody of the sheriff and to be delivered up to the military authorities. In his opinion Mr. Justice Field wrote:

> 'When the armies of the United States were in the territory of insurgent States, banded together in hostility to the national government and making war against it, in other words when the armies of the United States were in the enemy's country, the military tribunals mentioned (court martials) had, under the laws of war, and the authority conferred by the section named (12 Stat. 736), exclusive jurisdiction to try and punish offences of every grade committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy, or amenable to his tribunals for offences committed by them. They were

Case No. 100 *Contd.*

answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished.

> ' It is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. . . . The fact that war is waged between two countries negatives the possibility of jurisdiction being exercised by the tribunals of the one country over persons engaged in the military service of the other for offences committed while in such service. Aside from this want of jurisdiction, there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he had invaded.'

" Mr. Justice Field also delivered the opinion of the Court in *Dow* v. *Johnson*, 100 U.S. 158, 25 L. Ed. 632, which has become a part of the military law. In considering the effect on the invading army and the relation of local tribunals due to temporary occupation, and occupation of any portion of the enemy's country, he wrote, at page 166 of 100 U.S., 25 L. Ed. 632 :

> ' They (the municipal laws) are considered as continuing, unless suspended or superceded by the occupying belligerent. But their continued enforcement is not for the protection or control of the army, or its officers or soldiers. These remain subject to the laws of war, and are responsible for their conduct only to their own government, and the tribunals by which those laws are administered. If guilty of wanton cruelty to persons, or of unnecessary spoliation of property, or of other acts not authorized by the laws of war, they may be tried and punished by the military tribunals. They are amenable to no other tribunal, except that of public opinion, which, it is to be hoped, will always brand with infamy all who authorize or sanction acts of cruelty and oppression.'

" In *Hamilton* v. *McClaughry*, 10 Cir., 136 F. 445, also a component part of the military law, a soldier of the United States army ordered to be and stationed at Camp Reilly, Pekin, China, during the ' Boxer Uprising ' in China, shot and killed a corporal of his regiment. The soldier was tried and convicted of the crime of murder by general court martial and sentenced to be dishonorably discharged with forfeiture of pay and allowances due, and to be confined at hard labor for life. Attack was made upon the jurisdiction of the court martial by petition to the Circuit Court of Kansas. The Court said, at page 448 of 136 F. :

> ' As shown by the record, during the military occupation of China by the troops of this government, no less than 271

> trials by general court-martial were had, which resulted in 244 convictions. Under the well-settled principles of law the offenders so tried were not amenable to the laws of the government of China, and the offenses by them committed, if any, whether by the laws of this country denominated as the crime of murder, robbery, larceny, or other felony, were not committed in violation of any law of China, because done by persons in the military service of this country while stationed in China.'

After reference and quotation from the opinions in *Coleman* v. *Tennessee, supra*, and *Dow* v. *Johnson, supra*, the Court continued at page 449 of 136 F. in the opinion in the *Hamilton* case:

> 'It therefore must follow, of necessity, if any punishment shall be meted out for the many crimes committed by persons in the military service of the United States during the occupation of China, such punishment must be imposed under the fifty-eighth article of war (now articles 92 and 93) or the offender go unpunished; and this is true, whether the military occupation of China by the forces of this government was by or against the consent of the government of China. That is to say, if the homicide committed is an offense at all, it was an offense committed in violation of the military laws of this country, transplanted to China, under the authority of the military department of this government, for the government of our military forces while there engaged in operations against the 'Boxer Uprising,' and for the protection of the citizens and representatives of this government and their property.'

" It is also well settled that the existence of a condition of war must be determined by the political department of the government; that the Courts take judicial notice of such determination and are bound thereby. War between the United States, and Italy and Germany was declared on December 11, 1941. The Armistice between the United States and Italy was agreed upon September 8, 1943. Italy declared war against Germany effective October 13, 1943. The German forces in Italy surrendered May 2, 1945. The peace treaty between the United States and Italy became effective September 15, 1947. It is not disputed that the alleged crimes upon which this proceeding is based were committed December 6, 1944, at a place in northern Italy then occupied by the German armies, the common enemy of the United States and of Italy; nor that the demanding government was not then, with its armies or otherwise, physically in control of the place of the crime.

" This Court feels constrained to follow the established precedents. In doing so it is necessary to determine that the treaty between the United States and Republic of Italy is not

Case No. 100 Contd. applicable to the present matter; that the treaty cannot be extended to permit the issuance of a certificate to the Secretary of State that a warrant may issue upon the requisition of the proper authorities of the Italian government for the surrender of Carl George LoDolce for extradition to Italy for trial by the courts of Italy for the crimes of murder and robbery."

[Report: 106 F. Supp. 455.]

NOTE.—This case is noted in *Harvard Law Review*, 66 (1953), p. 1136, and *University of Florida Law Review*, 6 (1953), p. 254.

Case No. 101 **Extradition—Conditions of—National of State of Asylum—Relative Importance of Nationality at Time of Commission of Offence and at Time of Request for Extradition.**

In re A.

France, Court of Appeal of Aix. March 15, 1951.

THE FACTS.—This was a request by the Italian Government for the extradition of one A., charged with having committed certain offences in Italy on September 3, 1945. It was contended on behalf of the accused that he could not be extradited, since he had, by a naturalization decree of April 28, 1950, become a French national. The Franco-Italian Extradition Treaty of May 12, 1870, again brought into force as from February 10, 1948, provides for the non-extradition of nationals of the contracting parties. The question before the Court was whether this provision covered persons who were nationals of the State of asylum at the time of the request for extradition, or only persons who were nationals of that State at the time of the commission of the offence in respect of which extradition was sought.

Held: that extradition could be granted. The material point of time for the consideration of the nationality of the accused was the date of the commission of the offence. The Court said:

" Article 1, paragraph 2, of the Extradition Law of March 10, 1927, provides that it applies to all points which are not covered by treaty. Article 5, paragraph 1, provides that the question whether a person is a French citizen or protected person shall be decided with reference to the date of the commission of the offence in respect of which extradition is sought. That rule is in conformity with that laid down in Article 5, paragraph 3, of the Code of Criminal Procedure, which merely gives the French judicial authorities discretionary power to prosecute the accused in France if he acquired French nationality only after the commission of the crime."

[Report: *Revue critique de Droit international privé*, 40 (1951), pp. 472–473.]

Extradition—Conditions of—Compatibility of Request for Extradition with Prior Expulsion by Requesting State—Conviction *in absentia* as Basis of Request—Double Criminality—Political Crimes—Extradition Treaty between Italy and France.

Case No. 10

Ex parte STENGER.

Italy, Court of Cassation. September 3, 1951.

THE FACTS.—Stenger was expelled from France in 1948 and, in consequence, placed under police surveillance on taking up residence in Italy. On October 8, 1949, a warrant for his arrest was issued by the Tribunal of the Seine. Notice of this was communicated by telegraph to the Italian authorities, who thereupon placed Stenger under provisional arrest. On October 26, 1949, the French Court sentenced him *in absentia* to two years' imprisonment on a charge of being an accessory to a crime in the nature of embezzlement (*abus de confiance*). A note of the Ministry of Justice dated October 30, 1950, called upon the Procurator-General attached to the Court of Appeal of Milan to bring proceedings for Stenger's extradition at the instance of the French Government. After hearings on November, 6, 1950, and January 22, 1951, his extradition was ordered. On appeal,

Held: that the appeal must fail, the terms of the Treaty of Extradition with France having been complied with. The Court said:

" Stenger appeals, alleging that Article 524 (1) of the Code of Criminal Procedure, read with Article 675 (2) and Article 13, have been violated by reason of contradictions and insufficiencies in the request for extradition. He avers in particular that (1) the Court below was wrong in entertaining a request for his extradition, made by the French Government in October 1950, in view of the fact that he had previously been expelled from France under an order made by the Minister of the Interior on December 11, 1948; (2) that the request was inadmissible because, by reason of his having protested against his conviction *in absentia*, the latter was, under French law, automatically quashed; (3) that there was not sufficient evidence upon which it could be determined whether a prima facie case has been made out or whether the principle of double criminality was respected; and (4) that, in determining the character of the crime charged as political or otherwise, the connection between that crime and his expulsion from France upon exclusively political grounds has been ignored.

" None of the contentions upon which the appeal is based appears to the Court to be well founded.

" (A) The appellant has argued in the first place that,

Case No. 102 *Contd.*

since the French Government has expelled him from its territory, it cannot seek his extradition without first formally revoking the order for his expulsion. The Court below held in this connection that both the order for expulsion and the request for extradition being administrative acts, the latter could impliedly revoke the former. The appellant challenges this conclusion and denies that an administrative act can be impliedly annulled. He contends that a request for extradition is at one and the same time an administrative act, in the sense that it is an act internal to the requesting State addressed to its own agencies and calling for such communication or other action as may be necessary, and also an act of an international character, in that it is addressed to the State of rendition and constituted an exercise of a power or discretion derived from international rules. It is to be observed upon this argument that revocability is a characteristic of administrative acts in general, and especially of discretionary administrative acts such as an order for expulsion. In the French internal system a request for extradition necessarily implies the revocation of a prior order for expulsion, albeit only in so far as the implementation of the request requires. But, quite apart from this, it suffices for the rejection of this argument that a court examining a request for extradition is concerned with that request *qua* an international act exclusively. Its incompatibility with an earlier order for expulsion is of no significance. In this case there is indeed a degree of incompatibility between the request, viewed as a French administrative proceeding of an internal kind, and the order for expulsion. But, the question whether the one revokes the other apart, this is wholly irrelevant to the question of the formal validity of the request *qua* an international act, the examination of which necessitates no enquiry as to its validity *qua* an internal administrative act of the requesting State.

" (B) In the second place, the appellant contends that, because he disputes the decision of the thirteenth correctional session of the Tribunal of the Seine, dated December 26, 1949, whereby he was convicted *in absentia*, that decision is automatically annulled under Article 476 of the [French] Code of Criminal Procedure and cannot, therefore, be treated as the equivalent of a warrant of arrest. He avers that under that Article, his dispute of the decision, and equally his having surrendered to the Italian police and being taken into provisional custody, involve that it, and all measures taken under it, are annulled. Apart from the question whether, under French law, the provisional arrest of the appellant in Italy and his handing over to the French authorities produces the consequences the appellant claims, it must be observed that this Court has already held that the reopening of the *instruction* involves that a person whose extradition is requested must be considered liable to conviction.[1] In the light of this it can avail the appellant nothing to argue that the annulment of the conviction *in absentia* involves its annulment as the equivalent of a warrant for his arrest. And in any event the issue of a warrant for arrest is distinct from the verdict, and the latter is not an indispensable prerequisite to such issue. By Article 94 of the [French] *Code d'instruction*, where the crime in question carries the sanction of imprisonment or any more severe penalty the judge may, upon completion of the *instruction* or in the case that the accused is a fugitive, issue a warrant of arrest. In this case, moreover, the warrant was clearly issued before the sentence. Moreover, even if the quashing of the sentence implies its annulment, it is clear that the warrant may be held to have been communicated before the telegraphic request for the provisional arrest of the appellant and the note of the French Embassy of October 30, 1950, to the Minister of Justice regarding his extradition. It is scarcely necessary therefore to point out the illogicality of the appellant's argument that his conviction *in absentia* cannot justify his arrest because the consequence of his arrest is to annul that conviction.

" (C) In the third place, the appellant argues that his conviction *in absentia* provides no sufficient evidence upon which it can be determined whether a prima facie case against him has been made out or whether the principle of double criminality is satisfied. He contends that Article 13 of the Criminal Code and Article 667 (2) of the Code of Criminal Procedure impose a requirement of such evidence in relation to extradition to or from France. His argument here, as under the second head of his appeal, is that the terms of the Italian-French Treaty have not been observed. Thereunder extradition may be ordered upon bare communication of a warrant of arrest if such warrant of itself discloses sufficient information for the Court to be satisfied as to these matters.

" In Italian law, as the respondent correctly contends, the general principle as to extradition is contained in Article 13 of the Criminal Code, paragraph (1) of which lays down that extradition is governed by the criminal law, by treaties and by international usage. As regards treaties with France, the Convention of May 12, 1870, implemented by Royal Decree No. 5726 of June 30, 1870, as modified by the Declaration of July 16, 1873, implemented by Royal Decree No. 1550 of August 28, 1870, is still in force. In Article 2 thereof, unlike later extradition treaties with other States, there is a list of extraditable offences. Amongst these is listed *abus de confiance*, and the Declaration makes it clear that Article 2 (23) of the Treaty, which permits extradition in respect of that offence,

---

[1] The Court here referred to its decision in *Re Cartonnet*, dated May 10, 1950: *Foro italiano repertorio*, 1950, *Estradizione*, No. 13.

Case No. 102 *Contd.*

is to be understood as embracing ' *abus de confiance* generally and not only in the case where a public official is charged therewith '. Article 7 of the Treaty stipulates that extradition may be granted on production of a warrant for the arrest of the accused or some other document having at least the force of such a warrant, showing the nature and gravity of the acts charged, their date, and the penalty prescribed for them.

" On this basis the respondent makes the following submissions :

" (*a*) Given the general principle laid down by this Court that a special rule prescribed by treaty prevails over a subsequent general rule even of a constitutional character,[1] Article 13 of the Penal Code has not repealed Article 2 of the Treaty with France, which is confined to a listing of the crimes in respect of which extradition may be granted, without enquiry as to whether acts constituting the basis of a request therefor are criminal in either Italian or French law.

" (*b*) Article 667 (1) of the Code of Criminal Procedure, having set out the condition governing the grant of requests for extradition, goes on to say : ' Where there is no treaty or the treaty does not otherwise provide, [the Court] shall examine whether the acts and documents communicated to it disclose a prima facie case against the accused or whether his conviction is duly certified.' This rule is expressed not to apply where a treaty provides to the contrary. As respects the Treaty with France, the only question could be whether the general rule is excluded solely by express contrary provisions or whether its exclusion may be implied from the general tenor of the Treaty. The Court below has held that the Treaty with France dispenses with any necessity to make any further enquiry because extradition may be granted thereunder on the mere production of a warrant for the arrest of the accused or a like document.

" (*c*) It is in any event manifest that in this case the principle that a prima facie case against the accused should be made out and the principle of double criminality have been satisfied.

" As respects the sufficiency of evidence of the guilt of the accused, it may be conceded that he was convicted *in absentia* following his arrest in accordance with Article 663 of the Code of Criminal Procedure in pursuance of the request for his extradition made by the French State. But such conviction was in accordance with the procedural safeguards afforded by a highly civilised State. Moreover, the interrogation of the accused conducted by the examining magistrate on November 28, 1950, disclosed the following facts : in 1948 and 1949 one Valat, a French inspector of police, embezzled six million francs collected for the erection of a monument to deceased policemen. For no satisfactory reason he gave one million francs out of this sum to Stenger. Later Stenger, on learning that Valat was accused of embezzling the funds collected for the memorial, being unable to provide him with two million francs to make matters good, gave him a car in order that he might sell it and apply the proceeds for this purpose. The accused's explanation of these transactions is scarcely credible. It is not to be supposed that two individuals of different nationalities, one of them a minor police official, should have made mutual gifts of millions and motor cars out of pure friendship. The facts provide more than sufficient ground for suspicion of Stenger's complicity, especially as it appears that he knew of the charge against Valat when he gave the car to him. And, as this Court has frequently held, failing conclusive evidence of the accused's guilt, the existence of strong grounds for suspicion suffices for the satisfaction of Article 667 (1) of the Code of Criminal Procedure.

---

[1] The Court here referred to its decision of March 5, 1949.

" The principle of double criminality appears no less to have been respected. The crime charged against Stenger in the warrant for his arrest and that of which he was convicted *in absentia* is specified as that of being an accessory to an *abus de confiance* within the meaning of Article 408 of the French Penal Code, whereby it is made an offence for a private person to embezzle money or movables of which he is a bailee. Such an act is undoubtedly a crime in Italian law also. Indeed, Valat being a public official, his act if committed in Italy would have been an aggravated offence under Article 646, read with Article 61 (1) of the Criminal Code, if not fraudulent conversion within the meaning of Article 315. In virtue of Articles 70, 116 and 117 a person may be charged with being an accessory to either of these offences. Even if the case be treated as merely one of aggravated embezzlement within Article 646 (1) it is manifest that the requirement that, for the act to be criminal, there must be a complaint, is satisfied. Having regard to previous decisions of this Court,[1] this circumstance is in any event immaterial. For even if, contrary to the views of modern writers, the existence of a complaint is a substantive rather than a procedural requirement, since it is a requirement imposed only by our Code it is inapplicable in relation to extradition proceedings.

" (D) By his fourth head of appeal the appellant impugns the decision of the Court of first instance on the ground that that tribunal should have refused the request for extradition because of its connection with his expulsion from France on purely political grounds. This argument clearly has no merit since extradition has been requested in respect of an ordinary crime and there is no connection between the request therefor and the earlier expulsion, which was based, as Stenger himself

---

[1] The Court here referred to various earlier decisions reported under the heading *Estradizione*, in *Foro italiano*, 1933 and 1948.

Case No. 102 *Contd.*

admitted at his first interrogation on November 28, 1950, on charges of a very different character, namely, evasion of military service and breaches of the price control regulations. Nothing brought out at his second interrogation on January 22, 1951, supports the suggestion that Stenger's extradition is being sought for a political crime rather than the ordinary crime of *abus de confiance*."

[Report: *Foro italiano*, 1952, II, 1.]

Case No. 103

Extradition—Conditions of—Request for Delivery of Convicted Person—Subsequent Amnesty in Requested State—Amnesty Applicable to Terms of Imprisonment Equivalent to Term Imposed by Court of Requesting State—Whether Person Liable to Extradition—The Law of Germany.

AUSTRO-GERMAN EXTRADITION CASE.

German Federal Republic, Court of Appeal of Hamm.
January 15, 1951.

THE FACTS.—The Austrian authorities requested the German authorities to extradite one F., who had been sentenced to a term of six months' imprisonment by an Austrian court. It was contended on F.'s behalf that he was not liable to be extradited, on the ground that an amnesty had been granted in Austria in respect of all sentences of less than six months' imprisonment. Of its own accord the Court of Appeal of Hamm, which had to adjudicate upon the request for extradition, considered the fact that a German Law enacted on December 31, 1949, granted an amnesty in respect of sentences of less than six months' imprisonment passed by German courts.

Held: that s. 4 (2) of the German Law of Extradition of December 23, 1929, which provides that extradition is not to be granted in cases where a sentence cannot be carried out by reason of an amnesty, applied to an amnesty granted under German law notwithstanding that the sentence had been imposed by a foreign court, and that the request for extradition must be refused, irrespective of whether or not F. might also have been entitled to an amnesty under Austrian law. The Court said:

" After his arrest F. relied upon an amnesty in Austria. This question has not yet been resolved. Doubts have arisen, however, whether the German Amnesty Law of December 31, 1949, may not also preclude extradition. By virtue of s. 4 (2) of the German Extradition Law extradition is not permissible in cases where a criminal prosecution or the carrying out of a sentence would not be permissible by reason of an amnesty. . . . This applies equally where the offence has been committed abroad. . . . If German law were to be applied the sentence in the present case would fall within s. 2 (1) of the Amnesty Law. The warrant of arrest must therefore be set aside, and the application of the Austrian amnesty for which the appellant contended is immaterial." [1]

[Report: *NJW*, 4 (1951), p. 208.]

Extradition—Principle of Speciality—Interpretation of Extradition Order—War Criminals—The Law of Denmark. **Case No. 104**

In re ISSEL.

Denmark, Eastern Provincial Court. October 19, 1950.

THE FACTS.—The accused, a German citizen, was from 1944 to 1945 the leader of a German " terror group " in occupied Denmark. In this capacity he ordered or took part as leader in several German terrorist actions as the result of which forty-four Danish citizens were shot in the streets or in their homes or killed by demolitions in which about sixty buildings were blown up. After the war the accused escaped to Germany. He was arrested in Berlin in February 1949 and in accordance with a decision of the British Extradition Tribunal in Hamburg of May 19, 1949, he was extradited to the Danish authorities.

By a judgment of the Lower Court of Copenhagen of January 21, 1950, the accused was sentenced to death. He appealed to the Eastern Provincial Court. He contended, *inter alia*, that according to the decision of the British Extradition Tribunal he had been extradited for murder only, and that according to the German Criminal Code the acts with which he was charged did not constitute murder.

Held: that while it was doubtful whether the accused, according to the wording of the extradition order, could be sentenced with respect to the demolitions and while he must therefore be acquitted on that charge, the extradition order must be deemed to include homicide as described in the indictment. The accused was sentenced to twenty years' imprisonment.

[Report: *Ugeskrift for Retsvaesen*, 1951, p. 211.]

---

[1] The Federal Supreme Court, on an appeal by the federal Public Prosecutor, confirmed the order of the Court of Appeal of Hamm, in a judgment dated June 7, 1951. In his notice of appeal the Public Prosecutor requested the Supreme Court to give a ruling on the following question:

" Does a German amnesty preclude extradition in all cases, or only when there is an independent German right to inflict punishment which exists side by side with a similar right of a foreign State ? "

The Supreme Court gave the following ruling:

" Extradition must not be granted if, on the assumption of a reversal of the factual position, a prosecution could not, according to the provisions of a German law of amnesty, be launched, or a sentence executed, in respect of the offence which is intended to form the basis of extradition. In this context it is immaterial whether there is an independent German right to inflict punishment which exists side by side with a similar right of a foreign State " : *BGHSt*, I, 222.

Case No. 105 **Extradition—Conditions of—State Succession—Effect of State Succession on Process of Extradition—Merger of Indian State with Union of India—The Law of India.**

REX *v.* ABUL HASAN.

India, High Court, Allahabad.
(Bhargava J.)
December 22, 1949.

THE FACTS.—A warrant for the arrest of three persons was received from a court in Bhopal (one of the Indian States subsequently merged with India) by the Sub-Divisional Magistrate of Shahjahanpur in April 1949. The Sub-Divisional Magistrate recommended to the Provincial Government the extradition of these three persons to the Bhopal State, and pending the orders of the Government committed them to jail. Revision applications against this order of the Sub-Divisional Magistrate were filed before the Sessions Judge of Shahjahanpur who made a reference thereon to the High Court of Allahabad. In June 1949, the Bhopal State was merged with the Union of India.

Held: that in view of the merger of the State of Bhopal in the Union of India no question of extradition could arise. By reason of this merger the State of Bhopal had ceased to exist. *Per* V. Bhargava, J.: " This is a reference by the learned Sessions Judge of Shahjahanpur arising out of proceedings for the extradition of three persons. . . .

" It appears that since the orders were passed by the learned Sub-Divisional Magistrate of Shahjahanpur, the position with regard to the Bhopal State has undergone a drastic change. In April, 1949, Bhopal was a State under a ruling prince. On the 1st of June, 1949, the Central Government assumed the administration of Bhopal under a notification issued in exercise of the powers conferred by . . . the Extra-Provincial Jurisdiction Act, 1947. . . . Under this notification, the whole administration of the State of Bhopal was assumed by the Central Government and under clause (4) of that notification, the Central Government directed that ' all Judges, Magistrates and other officers who immediately before the commencement of this Order, were exercising lawful functions in Bhopal or any part thereof, shall, until other provision is made by the Chief Commissioner, continue to exercise their respective functions in the same manner and to the same extent as they were doing before the commencement of this Order '. The effect of this provision in the notification was that the courts of the Magistrates and Judges constituted in the Bhopal State were continued under the authority of the Central Government.

" In the present case the Court which sent the warrant for service to the Sub-Divisional Magistrate of Shahjahanpur has been continued under the authority of the Central Government and consequently . . . the Sub-Divisional Magistrate had to execute it as if it were a summons or a warrant received by him from the Indian Union. No question of extradition, therefore, arises. . . . In this case, therefore, the Sub-Divisional Magistrate is now required to deal with these three persons in accordance with the procedure prescribed by [the] Criminal Procedure Code. There is, therefore, no need for any extradition proceedings. . . ."

[Report: I.L.R. [1951] 1 All. 736.]

Extradition — Conditions of — Extradition of Nationals — Absence of Extradition Treaty—The Law of Argentina. **Case No. 106**

In re ARTAZA.

Argentina, Court of Second Instance, Buenos Aires.
December 27, 1951.

THE FACTS.—Brazil requested the extradition of Artaza, an Argentine national, on a charge of homicide. The appellant pleaded that as an Argentine national, residing in his own country, he was not liable to extradition, but that he might be tried for the alleged offence in the Argentine courts. Both Argentina and Brazil are parties to the Treaty on International Penal Law concluded at Montevideo in 1940, which provides in Article 19 that nationality will not be invoked as a bar to extradition. This Treaty has not been ratified, however, by Argentina. Artaza appealed from a decision of the Court of first instance granting extradition.

Held: that the request for extradition must be denied. In the absence of an extradition treaty between the parties, the law of the asylum State is controlling in the matter. The Court said in part:

" The Treaty on Penal Law, signed at Montevideo in 1940 by the Republics of Argentina and the United States of Brazil, has not been ratified as yet by the National Congress; therefore, its provisions are not the law of the land and may not be invoked in the instant case. In the absence of an extradition treaty with the demanding State, the provisions of Title V, chapter II, of Book IV, section II, of the Code of Criminal Procedure govern the proceedings. According to Article 669 of this Code an Argentine citizen has the right to request a trial before an Argentine court. As the appellant has exercised this right, the extradition request is denied."

[Report: 65 *Revista jurídica argentina La Ley* (January–March, 1952), p. 578.]

Case No. 107

Extradition—Conditions of—Absence of Treaty of Extradition —Defects of Request for Extradition—The Law of Argentina.

In re FONSECA.

Argentina, Supreme Court. May 16, 1951.

THE FACTS.—Portugal sought the extradition of Loff Fonseca on a charge of embezzlement. In the absence of a treaty between the two States, extradition was requested on the basis of reciprocity. The defence, pleading that in the absence of an extradition treaty the determination (*calificación*) of the nature of the charges must be made by Argentina according to Argentine law, submitted that the petition omitted certain fundamental points. In particular, the date of the alleged offence was not specified although this was imperative in order to determine whether penal action was prohibited by lapse of time.[1]

Held: that the extradition request must be denied. In the absence of a treaty, an extradition request must conform to the requirements of the law of the asylum State. The Court found that the extradition request was deficient in several respects, lacking, *inter alia*, a statement as to the date of the alleged offence. In the absence of an extradition treaty with Portugal, the provisions of Articles 650 and 655 of the Code of Penal Procedure must be observed. As the extradition request failed to meet these requirements, extradition must be denied.

[Report: 219 *Fallos de la Corte Suprema*, p. 484.]

Extradition—Conditions of—Extraditable Offences.

See Case No. 121 (*In re Daem*).

---

[1] In the case of *Riphagen*, also decided by the Argentine Supreme Court on May 16, 1951, the request of the Netherlands for the extradition of Riphagen was denied on the grounds that the time which had elapsed between the commission of the alleged offences and the submission of the extradition request exceeded the limit fixed by the Argentine Penal Code. The statutory limit was invoked under the terms of the Extradition Treaty with the Low Countries of September 7, 1893, which permitted the application of the law of the country which was less rigorous in this matter. 219 *Fallos de la Corte Suprema*, p. 489.

IV.—Procedure of Extradition

Extradition—Procedure of—Detention Prior to Request for Extradition—The Law of Argentina. **Case No. 108**

In re WEYER.

Argentina, Court of Second Instance (*Resistencia*)
August 3, 1951.

THE FACTS.—Weyer, a Paraguayan national, was detained for extradition to Paraguay on charges of homicide. He applied for a writ of habeas corpus, pleading that his detention was irregular because the magistrate had issued the order before receiving the official request and related documents. The Treaty on International Penal Law concluded at Montevideo in 1889 provided that a request for extradition may only be made by diplomatic or consular officials or directly by the Governments concerned. The action was brought on appeal.

Held: that the application for a writ of habeas corpus must be granted. A fugitive may not be detained for extradition in anticipation of the receipt of the official request accompanied by necessary documentary proofs. The Court found that the charges against Weyer had been made before the Court of first instance at Formosa by the Paraguayan Consul in that city, that the Judge had asked the Ministry of Foreign Relations to certify that the Consul had been recognized by the Argentine Government, and that on receiving the reply from the Ministry of Foreign Relations the Judge had ordered the arrest of Weyer. This reply, however, could not properly be construed as furnishing the basis for instituting extradition proceedings. Under the terms of the Montevideo Treaty on International Penal Law of 1889, extradition proceedings may be initiated only after the foreign authorities have submitted the request for extradition accompanied by necessary proofs which, in turn, will be transmitted by the Government to the Court for determination as to whether extradition should be granted.

[Report: 66 *Revista jurídica argentina La Ley* (April–June 1952), p. 496.]

V.—Political Crimes

Case No. 109 **Extradition—Conditions of—Political Offences—Whether Extradition Governed by Generally Accepted Principles of International Law—Whether Permissible in Absence of Treaty—Nature of Political Offences—Article 29 of Eire Constitution—Human Rights—Political Asylum—Universal Declaration of Human Rights, 1948—European Convention on Human Rights.**

THE STATE (DUGGAN) *v.* TAPLEY.

Eire, Supreme Court.
(Maguire C.J., Murnaghan, O'Byrne, Black and Lavery JJ.)
December 12, 1950.

THE FACTS.—Section 29 of the Petty Sessions (Ireland) Act, 1851, as adapted by the Petty Sessions (Ireland) Act, 1851, Adaptation Order, 1938, provides, *inter alia*, that whenever any person against whom any warrant shall be issued by any Justice in England for any crime or offence, shall reside or be in Ireland, it shall be lawful for the Commissioner or a Deputy Commissioner of the Garda Siochana or for any Justice [in Ireland] to endorse the warrant so as to authorize its execution within his jurisdiction.

On October 28, 1950, the " prosecutor ", Duggan, was taken into custody by the Garda Siochana on a warrant issued by a magistrate of the London Metropolitan Police Courts and duly endorsed for execution in Ireland by a Deputy Commissioner of the Garda Siochana. Duggan was detained in Bridewell Prison, Dublin, for the purpose of being handed over to the British police for trial for an offence against the Larceny Act, 1916. Duggan applied for and obtained a conditional order for habeas corpus *ad subjiciendum*, directed to the station sergeant of Bridewell Prison. An application to make the order absolute was rejected by the High Court, and Duggan appealed to the Supreme Court.

He argued, *inter alia*, that the procedure of the Act of 1851 no longer applied in Eire since the Constitution of 1937 provides in s. 29 (3) :

> " 3. Ireland accepts the generally recognized principles of international law as its rule of conduct in its relations with other States."

The procedure of the 1851 Act, it was submitted, was contrary to the rules of international law about extradition. International law permitted extradition only where there was a statutory authority based upon a treaty of extradition between the two countries concerned, and even so only when the offence was one in both jurisdictions and established by judicial inquiry not to be one of a political character ; and then only on condition that the person surrendered will be charged solely with the offence for which his extradition was demanded. These conditions were not provided for in the procedure of the 1851 Act and it followed that the procedure was repugnant to Article 29 of the Constitution.

Held: that the application to have the order made absolute could not be granted. The procedure of the Act of 1851 was not contrary to the Constitution, nor to generally recognized rules of international law. There was no rule of international law which forbade extradition in the absence of a treaty of extradition.

Maguire C.J., after stating the facts and dealing briefly with arguments based on the Constitution other than Article 29, continued :

" A study of the history of extradition shows that a change has come about in the attitude of States in regard to it. Grotius and other well-known writers took the view that according to the law and usage of civilised nations every sovereign state was obliged to grant extradition freely and without qualification or restriction. In the view of other jurists of high authority extradition was at most a duty of imperfect obligation.

" The negative doctrine that independent of special compact no state is bound to grant extradition seems now to be generally accepted.

" Having examined the practice of many states in this matter, Wheaton reaches the conclusion that ' the practice of nations does not furnish a definite rule on the subject '. ' It may, therefore, be assumed ', he adds, ' that the surrender of criminals is not at present looked upon as an absolute international duty. Every State may refuse to harbour fugitives if it pleases (and Holland freely acts without treaty) ; but if it prefers to receive and protect them, other States have no remedy but to enter in[to] treaties with it to regulate future cases ' : Wheaton's *International Law*, 6th ed., vol. 1, at p. 216. In modern times, owing to developments during the early and middle years of the last century, many important States indicated a readiness to receive and an unwillingness to surrender political refugees. Belgium, Holland, and England were three who took a lead in this matter. Accordingly, it became the practice to regulate extradition by treaties. The contents of these treaties vary within a very wide range. Although there are certain provisions common to most it is impossible to say that there are any defined rules as to what a treaty should or should not contain. An instance of this is that many States are not prepared to surrender their own citizens. Outstanding exceptions are the United States and Great Britain, both of which are prepared to do so. Again it is stated by Wheaton : ' It is an almost universal rule that no State will surrender

Case No. 109 *Contd.*

political refugees ' : Wheaton's *International Law*, vol. 1, at p. 217. While this is so there is no common form of clause in treaties dealing with the matter. An examination of a number of treaties shows furthermore that there is no accepted rule as to the offences which are to be excepted as being of a political character.

" If a recognised principle exists forbidding the extradition of political refugees it should be possible to state it in terms sufficiently definite to be applied by a Court of law.

" Mr. Ryan contended for the principle of exclusion in respect of offences of a political character. This is the wording of s. 3 of the Extradition Act, 1870. The difficulties of defining this phrase satisfactorily were emphasised in the case of *In re Castioni* ([1891] 1 Q.B. 149).

" In that case the Court, of which Fitzjames Stephen J. was a member, adopted as the meaning of ' offence of a political character ' the third of three possible views put forward by that learned Judge in his *History of the Criminal Law of England*, vol. 2, at pp. 70 and 71.

" The matter came again before the Court in *In re Meunier* ([1894] 2 Q.B. 415), where Cave J. said, at p. 419 : ' The last point taken is that, so far as regards the outrage at the barracks, the offence charged is one of a political character, and therefore the accused is not liable to be surrendered under the Extradition Acts ; for it is said that the outrage was an attack on Government property, and was an attempt to destroy the quarters occupied by the troops of the French Government. It appears to me that, in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not. In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other ; for the party with whom the accused is identified by the evidence, and by his own voluntary statement, namely, the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens. They may, secondarily and incidentally, commit offences against some particular Government ; but anarchist offences are mainly directed against private citizens. I agree, as to this question also, with the view taken by Sir John Bridge ; and I am of opinion that the crime charged was not a political offence within the meaning of the Extradition Act.'

" Mr. Ryan contends that the almost universal rule followed nowadays of excluding offences of a political character from extradition treaties makes their exclusion a principle of international law. This Court does not accept the view that a principle of international law can be established in this way—at least, where the principle sought to be established is contrary to, or qualifies, an existing rule. A study of the history of extradition shows that at one time leading jurists looked upon it as a duty of civilised States to grant extradition, although, as already pointed out, this is no longer accepted. International law does regard extradition as a duty, even though only of imperfect obligation. There is ' no universal rule of customary International Law in existence which commands extradition. Since, however, modern civilisation categorically demands extradition of criminals as a rule, numerous treaties have been concluded between the several States, stipulating the cases in which extradition shall take place ' ; Oppenheim's *International Law*, 4th ed., at pp. 565 and 566. Oppenheim further points out that although no universal rule of international law commands it, extradition is an established fact based on treaty.

" The present position is unsatisfactory since there are many hundreds of treaties which do not agree in detail. An examination of some of these will show how wide is the difference between them in the matter of offences of a political character and how very difficult it would be to extract from them any test of general application as to what constitutes an offence of a political character.

" I quote them from Appendix V in the *American Journal of International Law*, vol. 29, Nos. 1 and 2, January and April, 1935 [(Supplement)] :—

" 1. Treaty between United States of America and Great Britain, 22nd December, 1931 :—

' Art. 6.—A fugitive criminal shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of a political character . . .' (p. 317).

" 2. Treaty between Germany and Turkey, 3rd September, 1930 :—

' Art. 4.—1. The Contracting Parties shall not be bound to grant extradition for a political offense or an offense connected with a political offense and committed with a view to preparing for, ensuring the commission of, concealing or preventing such offense.

' 2. On the other hand, the obligation to grant extradition shall lie in the case of any act constituting a premeditated capital offense, including an attempt to commit such an offense and complicity therein, unless such act has been committed in " open combat ". In virtue of the present provision, an attack on the Head of the State or of the Government shall be an extraditable offense ' (p. 325).

" 3. Treaty between Brazil and Italy, 28th November, 1931 :—

' Art. V.—Extradition shall not be granted : (5) For political offenses or acts accessory thereto, except where the act in respect of which proceedings are instituted is primarily an offense under the ordinary criminal law . . .' (p. 330).

" It is provided that the applicant State must undertake that

Case No. 109 *Contd.* the political object or motive of the crime shall not increase the penalty. This treaty in effect permits extradition for political offences.

" 4. Treaty between France and Czechoslovakia, 7th Mar., 1928:—

' Art. 4.—Extradition shall not take place :

. . . . . .

(2) If the Party applied to considers the offense [for] which extradition is demanded to be a political offense or an act connected with such an offense. An offense committed or attempted against the person of a Head of State shall not be regarded as a political offense or as an act connected with a political offense when it constitutes assassination, poisoning or murder ' (p. 335).

" 5. Treaty between Belgium and Poland, 13th May, 1931 :—

' Art. 6.—Extradition shall not be granted if the offense for which it is requested is regarded by the State applied to as a political offense or as an act connected with such an offense.

' An attack made or attempted upon the person of a Head of State or the members of his family shall not be deemed to be a political offense or an act connected with a political offense when it constitutes assassination, murder or poisoning, or an attempt to commit or participation in such an offense ' (p. 343).

" Reference may also usefully be made to certain extradition statutes of various States for the variety of provisions relating to the matter of extradition in political cases.

" The following are taken from the same number of the *American Journal of International Law* :—

' I. Germany.—Extradition Law of the 23rd December, 1929 :—

' Art. 3 (1) The extradition is not permissible if the act which would be the basis for the extradition is political, or if it is connected with a political act in such a manner that it was meant thereby to prepare for, secure, conceal or prevent the latter.

' (2) Political acts are those punishable offenses (*Angriffe*) which are directed immediately against the existence of the security of the State, against the head or a member of the government of the State, as such, against a body provided for by the constitution, against the rights of citizens in electing or voting, or against the good relations with foreign States.

' (3) The extradition is permissible if the act constitutes a deliberate offense (*Verbrechen*) against life, unless committed in open combat ' (p. 385).

' II. Sweden.—Law of the 4th June, 1913 :—

' Sect. 7. Extradition may not take place for a political crime. However, in a case where the act for which extradition is requested also includes a crime of a non-political nature, extradition may be granted provided the act in view of the circumstances in the special case is found to have chiefly the character of a non-political crime.

' In no case shall murder, attempted murder or manslaughter of a foreign Chief of State or of a person belonging to the family of a foreign sovereign be regarded as a political crime ' (p. 415).

'III. Switzerland.—The Federal Law on Extradition, 22nd January, 1892 :—

'Para. VIII, Art. 10. Extradition is not granted for political offenses. It is granted, however, even when the guilty person alleges a political motive or end, if the act for which it has been requested constitutes primarily a common offense' [*sic*]. 'The Federal Tribunal decides liberally in each particular instance upon the character of the infraction according to the facts of the case.

'When the extradition is granted, the Federal Tribunal sets the condition that the person whose extradition is requested shall be neither prosecuted nor punished for a political crime, nor for his political motive or end' (p. 423).

"Clearly, these States do not make identical provisions for the matter in question, and they may be compared also with the provisions of the British Extradition Act, already referred to.

"These are only examples but they appear to show that there is no generally recognised exclusion of extradition in respect of political offences understood in any way which can be recognised or enforced in a Court of Law and that a Court could only deal with and apply the particular provision of a particular treaty.

"Mr. Ryan, in support of his contention that the non-extradition of political offenders was a principle of international law, further relies on the action of the Institute of International Law which, at its Meeting in Oxford in 1880, framed a draft convention, Art. XIII of which was in these terms :—'XIII. L'extradition ne doit pas avoir lieu pour faits politiques'. Wheaton's translation is :—'Extradition is inadmissible for purely political crimes or offences'. Lorimer in his *Law of Nations*, at p. 342, gives the text in English :—'Extradition ought not to take place for political offences'. He was present as a member of the Institute at the meeting at which the draft convention was framed. The only value of this draft convention, as Wheaton says, is that it showed a trend in favour of excluding political offenders from extradition, and we find it stated in the Supplement to the *American Journal of International Law*, vol. 29, Nos. 1 and 2, January and April, 1935, at p. 110, cited by Mr. McGilligan, that 'there is no generally recognized rule of international law holding that extradition for a political offense is never permissible irrespective of whatever be the point of view of the requested State in this respect'. The question came up for decision in the German Supreme Court on two occasions in the year 1926. In both cases the Court denied the existence of a rule of international law prohibiting the extradition of political offenders (see Reichsgericht decision of the 18th March, 1926, and the decision of the 25th June, 1926, where, in an extradition effected under the German-Spanish Treaty of the 2nd May, 1878, the German Supreme

Case No. 109 *Contd.*

Court held that the provisions of Article 6 of the treaty concerning the non-extradition of political offenders cannot be a bar to the prosecution of a person surrendered, without any condition, for murder, even if the Spanish Government, after the surrender, came to the conclusion that it erred in not recognising the political character of the act : *Op. cit.*, at p. 110, *note*).

" The submission that there is a generally recognised principle of international law that no State may either in pursuance of treaty or otherwise grant extradition in respect of a political offence appears to involve the proposition that by international law a State is bound to grant the right of asylum to political refugees from all other States.

" Such a proposition is undoubtedly stated in the Universal Declaration of Human Rights of the General Assembly of the United Nations Organisation, which was referred to in the course of the argument, Article 14 of which proclaims that ' 1. Everyone has the right to seek and enjoy in other countries asylum from persecution '.

" This Declaration does not, however, purport to be a statement of the existing law of nations. Far from it. The Declaration itself states that it proclaims ' a common standard of achievement for all peoples and all nations to the end that every individual and every organ of society keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction '.

" The Declaration, therefore, though of great importance and significance in many ways, is not a guide to discover the existing principles of international law.

" It is interesting to note that in the Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe and executed by the Ministers for External Affairs of thirteen European States, including Ireland, on the 4th November, 1950, at Rome, one of the limitations on the right to liberty and security of persons expressly recognised is ' (*f*) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition '. (Article 5 (1)(*f*).)

" The laws of many States provide for the deportation of aliens without any safeguard for political refugees.

" Sect. 5, sub-s. 1 (2), of the Aliens Act, 1935, provides that the Minister for Justice may, if and whenever he thinks proper, by order ' in respect either of all aliens or of aliens of a particular nationality or otherwise of a particular class or of particular aliens . . . (*e*) make provision for the exclusion or the deportation and exclusion of such aliens from Saorstat Eireann . . . '.

" This power has been exercised in many cases and this Court has in the case of *The State* (*Geortz*) v. *Minister for Justice* ([1948] I.R. 45) held enforceable an order of deportation made under this power.

" The opinion of the authors of the Article on the subject of Extradition in the Supplement to the *American Journal of International Law*, vol. 29, nos. 1 and 2, January and April, 1935, is (p. 110) that ' There is no reason why a State should be precluded from surrendering, if it so chooses, a person sought for a political offense '. Article 5 of the draft convention there discussed is in a permissive form. The commentators point out that extradition treaties concluded in the past hundred years, with few exceptions, and all multipartite conventions and drafts contain a proviso exempting, in mandatory or in permissive form and subject to various limitations, political offences from their operation. A great number of national statutes similarly provide for the non-extradition of alleged political offenders.

" The fact that some extradition treaties do not contain such an exemption and that there are variations in the limitations and restrictions placed upon the extradition of persons accused or convicted of political offences in both treaties and statutes and, above all, the fact that the clause dealing with the matter may take the mandatory or permissive form, makes it plain that international law does not demand the exclusion of political offences from extradition.

" The attempt therefore to establish that the non-surrender of political refugees is a generally recognised principle of international law fails. The farthest that the matter can be put is that international law permits and favours the refusal of extradition of persons accused or convicted of offences of a political character but allows it to each State to exercise its own judgment as to whether it will grant or refuse extradition in such cases and also as to the limitations which it will impose upon such provisions as exempt from extradition.

" The position would appear to be the same with regard to certain other classes of offences, *e.g.*, evasion of military service and religious offences.

" As regards the question of extradition, generally, it is of interest to note the opinion of Sir James Fitzjames Stephen, in his *History of the Criminal Law of England*, vol. 2, at p. 66 :— ' Various writers on international law have expressed their views on the subject, but no two nations follow the same practice, and it has in fact been found necessary to provide in each case special laws relating to the subject. These differ from each other widely in a variety of ways, and clearly show that the case of extradition is one in which all nations are to a greater

Case No. 109 *Contd.*

or less extent interested in the legislation of each, but in which no one law is common to or binding upon all.'

" Although Mr. Ryan strongly pressed the argument that extradition cannot take place in the absence of a treaty he cited no authority in support of this far-reaching proposition. The history of this matter shows that extradition between States took place from the earliest times. Although the tendency in modern times has been more and more to regulate the matter by treaty, there seems to be no reason why extradition may not take place in the absence of a treaty. The French law of the 10th March, 1927, expressly provides for the conditions on which extradition may be granted in the absence of a treaty.

" Mr. Ryan submitted that arrangements for extradition could only be made on a basis of reciprocity. In Great Britain Orders in Council made under the Irish Free State (Consequential Provisions) Act, 1922 (13 Geo. 5, Sess. 2, c. 2), ss. 5 and 6 provide explicitly for the execution of Irish warrants duly backed in Great Britain and these Orders were held still in force after the Constitution had come into operation in *R.* v. *Commissioner of Police and Another, Ex parte Nalder* ([1947] All E.R. 611) and have been re-enacted since the passing of the Republic of Ireland Act, 1948, in Great Britain by the Ireland Act, 1949 (12 & 13 Geo. 6, c. 41), s. 3, sub-s. 1 (iii).

" In the opinion of the Court, however, reciprocity is not a condition of a valid law of extradition and the operation of s. 29 of the Petty Sessions (Ireland) Act, 1851, is not dependent on the existence of similar legislation in Great Britain.

" The Court adopts the statement of the law as to this by Mr. Justice O'Byrne in *The State* (*Kennedy*) v. *Little* ([1934] I.R. 39, at pp. 60 and 61).

" In the result, the view of this Court is that there is no generally recognised principle of international law which forbids the surrender in accordance with s. 29 of the Petty Sessions (Ireland) Act, 1851, to Great Britain of persons—whether they are Irish citizens or others—to answer a charge of a criminal offence.

" Even if the rule of international law could be shown to be to the contrary it would still remain to be considered what the position should be in relation to an offence which was not a political one or not within a class in respect of which it was proved extradition should not be granted. The question would then arise whether the said s. 29, sub-s. 3 failed to continue in force or whether it did continue in force except in so far as it contravened any recognised principle of international law. Although this point was relied on it is unnecessary to base our conclusions or any decision upon it.

" The argument that some limitation should be placed on extradition having regard to the nature of the offence has force, but it is not an argument which can weigh with a Court whose function is to declare the law and not to make it. This section was taken over by the Constitution as part of the laws in force, and if modification is to be made in it that would be matter for the Legislature.

"In the opinion of the Court this appeal should be dismissed."

[Report: [1952] I.R. 62.]

Extradition—Extraditable Crimes—Political Offences—Execution on Political Grounds. **Case No. 11**

In re FICORILLI.

Switzerland, Federal Tribunal. February 14, 1951.

THE FACTS.—This was a request by the Italian Government for the extradition of one Ficorilli, an Italian national, who was charged with having, in December 1944, when a member of the neo-fascist San Marco division, carried out the execution of one Capt. Janelli as a "traitor". It was contended on behalf of the accused that the offence with which he was charged was political in character, and was therefore not extraditable.

Held: that extradition must be refused. The offence was political in nature. The Court said:

"The question before the Court is whether, in killing Capt. Janelli, Ficorilli committed a relative political offence in the meaning of Article 10 of the Federal Extradition Law and of Article 3 of the Italo-Swiss Extradition Treaty.

"A relative political offence is one which, while having the characteristics of a common offence, acquires a political character by virtue of the motive inspiring it, or the purpose for which or the circumstances in which it has been committed; in other words, it is in itself a common offence but has a predominantly political character.

"The Federal Tribunal has previously decided that one must regard as a political offence an offence which is the consequence and manifestation of an extraordinary agitation or tension between political parties, and of disturbances which lead the parties to use methods of violence against their opponents, causing disorders and large numbers of crimes of violence; and any act which, even when considered in isolation, must be considered to be a consequence of reprisals in a general political uprising and struggle for power, not as the carrying into effect of personal motives and private aims.

"In the present case there was armed conflict between two parties struggling for power, the partisans and the neo-fascists. Recourse was had to violence and to military or pseudo-military operations. . . . In the winter of 1944 there were two contending camps in Italy, fighting not only on the international

Case No. 110 *Contd.* plane for or against the victory of the Allies or of the Germans, but internally for or against the Badoglio Government (replaced by the Bonomi Government in May 1944), for or against the neo-fascist Government.

" That the struggle between the two contending groups assumed the character of civil war is shown by a Decree-Law of July 25, 1944 (issued by the Bonomi Government), entitled ' Sanctions against Fascism '. Article 5 of that Decree-Law provided :

> ' Any person who, after September 8, 1943, has committed or commits offences against the safety of the State, by intelligence, correspondence or collaboration with the German invader, shall be punished in conformity with the provisions of the Penal and Military Code of War.
>
> ' The penalties provided for soldiers shall be applicable also to civilians. Soldiers shall be subject to the jurisdiction of military tribunals, civilians to that of ordinary courts.'

" The soldiers and officers of the San Marco division, by the mere fact that they participated in military operations against the partisans, made themselves liable to punishment in conformity with Article 51 of the Penal Military Code of War. . . . That offence, considering the circumstances in which it was committed and the aim sought, had a political character. Admittedly, the Italian authorities do not ask for extradition in respect of that offence. . . . The request for extradition relates exclusively to the execution of Janelli. According to the Italian authorities a distinction must be made between the two offences. But it is clear that, if the circumstances in which it was committed and the purpose it sought to serve are taken into account, even the execution of Janelli appears to be a political act. Janelli, an officer of the neo-fascist division of San Marco, deserted and went over to the partisans, with whom he fought against his former comrades-in-arms. Subsequently he returned to the neo-fascist side and helped in a search for arms and munitions belonging to the partisans. At the end of that operation he was executed—significantly not by Ficorilli himself, but by a subordinate of the latter. . . .

" It is, of course, conceivable that a soldier should kill another during military operations from personal motives. But such motives must appear from the judgment or the allegations of the authority requesting extradition. . . ."

[Report : *Arrêts du Tribunal Fédéral Suisse*, 77 (1951), I, pp. 57–65.]

Extradition—Political Crimes—Avoiding Military Service.

See Case No. 102 (*Ex parte Stenger*).

PART VII

DIPLOMATIC AND CONSULAR INTERCOURSE AND PRIVILEGES

A—PERMANENT DIPLOMATIC ENVOYS

III.—Privileges and Immunities of

i.—Diplomatic Envoys and their Staff

Diplomatic Privileges and Immunities—Immunity from Jurisdiction—Civil Action—Immunity in Respect of Acts of Violence. **Case No. 111**

MARTELLY ET ADMIN. DES DOMAINES *v.* DÍEZ DEL CORRAL.

France, Court of Appeal of Paris. June 9, 1950.

THE FACTS.—The Administration des Domaines had given Martelly the lease of an apartment administered by them, and previously occupied by a Mrs. Wallace who had been given notice for April 1, 1949. When Martelly attempted to take possession of the apartment, he found it occupied by one Thioliaz, who had installed himself in it with the agreement of Mrs. Wallace, in violation of the terms of her lease, and by Díez del Corral, Cultural Counsellor of Spain in Paris. Martelly and the Administration des Domaines jointly brought proceedings before the Juge des Référés for the eviction of Thioliaz and Díez del Corral. The Juge des Référés ordered the eviction of Thioliaz. With regard to Díez del Corral, the Juge des Référés held himself to be incompetent, in view of the fact that he enjoyed diplomatic privileges and immunities. This was an appeal against that decision. It was contended on behalf of the appellants that diplomatic immunity did not apply in a case in which the person enjoying the immunity had appropriated by force something to which he had no legal right.

Held: that the appeal must be dismissed. The Court said:
" Even if it is true that the defendant appropriated by force something to which he had no legal right, this does not prevent him from invoking his immunity from jurisdiction in a personal, civil action concerning movable property. The

Case No. 111 *Contd.* Court is thus incompetent to examine the substance of the dispute, and to determine the nature of the possession by Díez del Corral."

[Report: *Revue critique de Droit international privé*, 41 (1952), p. 339.]

iii.—The Family and Retinue of Diplomatic Envoys

Case No. 112 **Diplomatic Privileges and Immunities—Immunity from Jurisdiction—Wife of Diplomatic Envoy—Civil Action—Service of Process.**

SOC. CENTRALE DE CONSTRUCTIONS *v.* DE AYALA.

France, Tribunal Civil de la Seine. June 28, 1950.

THE FACTS.—This was an action to recover a sum of 2 million francs in respect of the construction of a house in 1932. Mrs. de Ayala, wife of the Cuban Envoy Extraordinary and Minister Plenipotentiary, was one of three persons who had formally recognized that they owed this sum to the plaintiff Company. Proceedings were instituted both against her and against her husband, and writ of process served on them at their residence in Paris. Mrs. de Ayala entered a plea to the jurisdiction, on the ground that she enjoyed diplomatic privileges and immunities. Mr. de Ayala did not enter an appearance. The question before the Court was whether the action against the de Ayalas was receivable.

Held: that the action was not receivable. The Court said: "The person of an envoy of a foreign Government must not be in any way interfered with. In virtue of that principle, it would be contrary to the diplomatic immunity appertaining to de Ayala by virtue of the functions exercised by him not only to bring him before a French court, but even to serve process on him for that purpose at his residence. Mrs. de Ayala enjoys the immunity resulting from the functions of her husband. There was no clear acceptance of process and of the jurisdiction of the French courts."

[Report: *Revue critique de Droit international privé*, 41 (1952), p. 340.]

iv.—The Official Residence of a Diplomatic Envoy

Diplomatic Intercourse—Legation Buildings—Asylum in—Termination of Asylum Illegally Granted—Whether Implying Duty to Surrender Person Seeking Asylum—Execution of Judgments of the International Court of Justice—Right of Intervention—Article 63 of the Statute of the Court. **Case No. 113**

HAYA DE LA TORRE CASE.

(*Colombia* v. *Peru*).

International Court of Justice.

(Basdevant, President ; Guerrero, Alvarez, Hackworth, Winiarski, Zoričić, De Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Read, Hsu Mo, Judges ; Aláyaz y Paz Soldán and Caicedo Castilla, Judges *ad hoc*.)

Judgment of June 13, 1951.

THE FACTS.—On December 13, 1950, the Government of Colombia filed in the Registry of the Court an application which referred to the Judgments given by the Court on November 20, 1950, in the *Asylum Case*, and on November 27, upon the *Request for Interpretation* of that Judgment.[1] After stating that Colombia and Peru were unable to come to an agreement on the manner in which effect should be given to the said Judgments as regards the surrender of the refugee Víctor Raúl Haya de la Torre, the application made a request to the Court in the following terms :

"(*a*) PRINCIPAL CLAIM :

Requests the Court to adjudge and declare, whether the Government of the Republic of Peru enters an appearance or not, after such time-limits as the Court may fix in the absence of an agreement between the Parties :

In pursuance of the provisions of Article 7 of the Protocol of Friendship and Co-operation between the Republic of Colombia and the Republic of Peru signed on May 24th, 1934, to determine the manner in which effect shall be given to the Judgment of November 20th, 1950 ;

And, furthermore, to state in this connection, particularly :

Whether Colombia is, or is not, bound to deliver to the Government of Peru M. Víctor Raúl Haya de la Torre, a refugee in the Colombian Embassy at Lima."

"(*b*) ALTERNATIVE CLAIM :

In the event of the above-mentioned claim being dismissed,

May it please the Court, in the exercise of its ordinary competence, whether the Government of Peru enters an appearance or not, and after such time-limits as the Court may fix in the absence

---

[1] See *International Law Reports*, 1950, Cases No. 90 and 106.

Case No. 113 *Contd.*

of an agreement between the Parties, to adjudge and declare whether, in accordance with the law in force between the Parties and particularly American international law, the Government of Colombia is, or is not, bound to deliver M. Víctor Raúl Haya de la Torre to the Government of Peru."

At the end of the written proceedings, the Parties presented the following Submissions :

On behalf of the Government of Colombia (Submissions in the Memorial) :

" May it please the Court,

To state in what manner the Judgment of November 20th, 1950, shall be executed by Colombia and Peru, and furthermore, to adjudge and declare that Colombia is not bound, in execution of the said Judgment of November 20th, 1950, to deliver M. Víctor Raúl Haya de la Torre to the Peruvian authorities.

In the event of the Court not delivering judgment on the foregoing Submission, may it please the Court to adjudge and declare, in the exercise of its ordinary competence, that Colombia is not bound to deliver the politically accused M. Víctor Raúl Haya de la Torre to the Peruvian authorities."

On behalf of the Government of Peru (Submissions in the Counter-Memorial) :

" May it please the Court,

I. To state in what manner the Judgment of November 20th, 1950, shall be executed by Colombia ;

II. To dismiss the Submissions of Colombia by which the Court is asked to state solely [' *sans plus* '] that Colombia is not bound to deliver Víctor Raúl Haya de la Torre to the Peruvian authorities ;

III. In the event of the Court not delivering judgment on Submission No. I, to adjudge and declare that the asylum granted to Señor Víctor Raúl Haya de la Torre on January 3rd, 1949, and maintained since that date, having been judged to be contrary to Article 2, paragraph 2, of the Havana Convention of 1928, ought to have ceased immediately after the delivery of the Judgment of November 20th, 1950, and must in any case cease forthwith in order that Peruvian justice may resume its normal course which has been suspended."

The circumstances which gave rise to the present case—arising out of two Judgments previously rendered by the Court (see *International Law Reports*, 1950, Cases No. 90 and 106)—and as stated by the Court were as follows :

" In its Judgment of November 20th, 1950, the Court defined the legal relations between Colombia and Peru with regard to matters referred to it by them relating to diplomatic asylum in general and particularly to the asylum granted to Víctor Raúl Haya de la Torre by the Ambassador of Colombia in Lima on January 3rd–4th, 1949. On the day of the delivery of this Judgment the Government of Colombia submitted to the Court a Request for Interpretation, which by the Judgment of November 27th, 1950, was declared to be inadmissible.

" On the following day, the Minister for Foreign Affairs and Public Worship of Peru, relying on the Judgment of November 20th, addressed a note to the Chargé d'Affaires of Colombia at Lima, stating in particular :

'The moment has come to carry out the Judgment delivered by the International Court of Justice by terminating the protection which that Embassy is improperly granting to Víctor Raúl Haya de la Torre. It is no longer possible further to prolong an asylum which is being maintained in open contradiction to the Judgment which has been delivered. The Colombian Embassy cannot continue to protect the refugee, thus barring the action of the national courts.

You must take the necessary steps, Sir, with a view to terminating this protection, which is being improperly granted, by delivering the refugee Víctor Raúl Haya de la Torre, so that he may be placed at the disposal of the examining magistrate who summoned him to appear for judgment, in accordance with what I have recited above.'

" In a Note dated December 6th, 1950, addressed to the Minister for Foreign Affairs and Public Worship of Peru, the Minister for Foreign Affairs of Colombia refused to comply with this request ; he relied in particular on the following considerations :

' Consequently, the Court formally rejected the complaint made against the Government of Colombia in the counter-claim of the Government of Peru, namely, that it had granted asylum to persons accused of or condemned for common crimes. Should Colombia proceed to the delivery of the refugee, as requested by Your Excellency, [it] would not only disregard the Judgment to which we are now referring, but would also violate Article 1, paragraph 2, of the Havana Convention which provides that : " Persons accused of or condemned for common crimes taking refuge in a legation shall be surrendered upon request of the local government ".'

Held: (i) on the principal Submission of the Government of Colombia and the first Submission of the Government of Peru, unanimously, that the Court " cannot give effect to these Submissions and consequently rejects them " ; (ii) on the alternative Submission of the Government of Colombia and the second Submission of the Government of Peru, by thirteen votes to one, that " Colombia is under no obligation to surrender Víctor Raúl Haya de la Torre to the Peruvian authorities " ; and (iii) on the third Submission of the Government of Peru, unanimously, that " the asylum granted to Víctor Raúl Haya de la Torre on January 3rd-4th, 1949, and maintained since that time, ought to have ceased after the delivery of the Judgment of November 20th, 1950, and should terminate ".

Case No. 113 *Contd.*

" The Court said : " In the first part of its principal Submission the Government of Colombia requests the Court

' to state in what manner the Judgment of November 20th, 1950, shall be executed by Colombia and Peru . . .'.

" On the other hand, the Government of Peru in its first Submission requests the Court

' to state in what manner the Judgment of November 20th, 1950, shall be executed by Colombia '.

" These Submissions are both designed to obtain a decision from the Court as to the manner in which the asylum should be terminated. The portion of the Judgment of November 20th, 1950, to which they refer is the passage where, in pronouncing on the question of the regularity of the asylum, it declares that the grant of asylum was not made in conformity with Article 2, paragraph 2 (' First '), of the Havana Convention on Asylum of 1928. The Court observes that the Judgment confined itself, in this connection, to defining the legal relations which the Havana Convention had established between the Parties. It did not give any directions to the Parties, and entails for them only the obligation of compliance therewith. The interrogative form in which they have formulated their Submissions shows that they desire that the Court should make a choice amongst the various courses by which the asylum may be terminated. But these courses are conditioned by facts and by possibilities which, to a very large extent, the Parties are alone in a position to appreciate. A choice amongst them could not be based on legal considerations, but only on considerations of practicability or of political expediency ; it is not part of the Court's judicial function to make such a choice.

" In the second part of its principal submission, the Government of Colombia requests the Court

' to adjudge and declare that Colombia is not bound, in execution of the said Judgment of November 20th, 1950, to deliver M. Víctor Raúl Haya de la Torre to the Peruvian authorities '.

" This part of the principal Submission of Colombia is strictly limited by the words ' in execution of the said Judgment of November 20th, 1950 '. These words serve to confine the request thus formulated, as in the first part of the same Submission, to the execution of the Judgment of November 20th, 1950.

" As was stated both in that Judgment and in the Judgment of November 27th, 1950, the Government of Peru had not demanded the surrender of the refugee. This question was not submitted to the Court and consequently was not decided by it. It is not therefore possible to deduce from the Judgment of November 20th any conclusion as to the existence or non-existence of an obligation to surrender the refugee. In these circumstances, the Court is not in a position to state, merely on the basis of the Judgment of November 20th, whether Colombia is or is not bound to surrender the refugee to the Peruvian authorities.

" For these reasons, the Court cannot give effect to the above-mentioned Submissions.

" The alternative Submission of the Government of Colombia is as follows :

> ' In the event of the Court not delivering judgment on the foregoing Submission, may it please the Court to adjudge and declare, in the exercise of its ordinary competence, that Colombia is not bound to deliver the politically accused M. Víctor Raúl Haya de la Torre to the Peruvian authorities.'

" In its second Submission the Government of Peru requests the Court

> ' to dismiss the Submissions of Colombia by which the Court is asked to state solely (" *sans plus* ") that Colombia is not bound to deliver Víctor Raúl Haya de la Torre to the Peruvian authorities '.

" The Government of Peru states in this Submission that the Court is asked by the Submissions of Colombia ' to state solely that Colombia is not bound . . .'. By using this word ' solely ' (' *sans plus* ') the Government of Peru wishes to convey that the legal position which the Judgment of November 20th created for it must in any case be preserved ; it refers thus to the statement set forth in its third Submission, which will be examined later.

" As mentioned above, the question of the surrender of the refugee was not decided by the Judgment of November 20th. This question is new ; it was raised by Peru in its Note to Colombia of November 28th, 1950, and was submitted to the Court by the Application of Colombia of December 13th, 1950. There is consequently no *res judicata* upon the question of surrender.

" According to the Havana Convention, diplomatic asylum is a provisional measure for the temporary protection of political offenders. Even if regularly granted it cannot be prolonged indefinitely, but must be terminated as soon as possible. It can, according to Article 2, paragraph 2, only be granted ' for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety '.

" The Court finds that the Convention does not give a complete answer to the question of the manner in which an asylum shall be terminated.

" As to persons accused of or condemned for common crimes who seek refuge, Article 1 prescribes that they shall be surrendered upon request of the local government. For

Case No. 113 *Contd.*

' political offenders ' another method of terminating asylum is prescribed, namely, the grant of a safe-conduct for the departure from the country. But, under the terms of the Judgment of November 20th, a safe-conduct can only be claimed under the Havana Convention if the asylum has been regularly granted and maintained and if the territorial State has required that the refugee should be sent out of the country. For cases in which the asylum has not been regularly granted or maintained, no provision is made as to the method of termination. Nor is any provision made in this matter in cases where the territorial State has not requested the departure of the refugee. Thus, though the Convention prescribes that the duration of the asylum shall be limited to the time ' strictly indispensable . . .', it is silent on the question how the asylum should be terminated in a variety of different situations.

" As the Court pointed out in its Judgment of November 20th, the Havana Convention, the first article of which requires that persons accused of or condemned for common crimes shall be surrendered to the territorial authorities, does not contain any similar provision in regard to political offenders. This silence cannot be interpreted as imposing an obligation to surrender the refugee in case the asylum was granted to him contrary to the provisions of Article 2 of the Convention. Such an interpretation would be repugnant to the spirit which animated that Convention in conformity with the Latin-American tradition in regard to asylum, a tradition in accordance with which political refugees should not be surrendered. There is nothing in that tradition to indicate that an exception should be made where asylum has been irregularly granted. If it had been intended to abandon that tradition, an express provision to that effect would have been needed, and the Havana Convention contains no such provision. The silence of the Convention implies that it was intended to leave the adjustment of the consequences of this situation to decisions inspired by considerations of convenience or of simple political expediency. To infer from this silence that there is an obligation to surrender a person to whom asylum has been irregularly granted would be to disregard both the rôle of these extra-legal factors in the development of asylum in Latin America, and the spirit of the Havana Convention itself.

" In its Judgment of November 20th the Court pointed out that, in principle, asylum cannot be opposed to the operation of justice. The safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals. Protection thus understood would authorize the diplomatic agent to obstruct the application of the laws of the country, whereas it is his duty to respect them. The Court further said that it could not admit that the States signatories to the Havana Convention intended to substitute for the practice of the Latin-American republics a legal system which would guarantee to their own nationals accused of political offences the privilege of evading national jurisdiction. But it would be an entirely different thing to say that the State granting an irregular asylum is obliged to surrender the refugee to the local authorities. Such an obligation to render positive assistance to these authorities in their prosecution of a political refugee would far exceed the above-mentioned findings of the Court and could not be recognized without an express provision to that effect in the Convention.

" Thus, the Havana Convention does not justify the view that the obligation incumbent on a State to terminate an asylum irregularly granted to a political offender, imposes a duty upon that State to surrender the person to whom asylum has been granted.

" In its Judgment of November 20th the Court, in examining whether the asylum was regularly granted, found that the Government of Peru had not proved that the acts of which Haya de la Torre was accused, before asylum was granted to him, constituted common crimes. Moreover, when the Court considered the provisions of Article 2, paragraph 2, relating to political offenders, it held, on the basis of these provisions, that the asylum had not been granted in conformity with the Convention. It follows from these considerations that, so far as the question of surrender is concerned, the refugee must be treated as a person accused of a political offence. The Court has, consequently, arrived at the conclusion that the Government of Colombia is under no obligation to surrender Haya de la Torre to the Peruvian authorities.

" The third Submission of the Government of Peru is as follows :

> ' In the event of the Court not delivering judgment on Submission No. I, to adjudge and declare that the asylum granted to Señor Víctor Raúl Haya de la Torre on January 3rd, 1949, and maintained since that date, having been judged to be contrary to Article 2, paragraph 2, of the Havana Convention of 1928, it ought to have ceased immediately after the delivery of the Judgment of November 20th, 1950, and must in any case cease forthwith, in order that Peruvian justice may resume its normal course which has been suspended.'

" The Government of Colombia has requested the Court to reject this Submission.

" In its Judgment of November 20th, the Court held that the grant of asylum by the Government of Colombia to Haya de la Torre was not made in conformity with Article 2, paragraph 2 (' First '), of the Convention. This decision entails a legal consequence, namely, that of putting an end to an illegal

Case No. 113 *Contd.*

situation : the Government of Colombia which had granted the asylum irregularly is bound to terminate it. As the asylum is still being maintained, the Government of Peru is legally entitled to claim that it should cease.

" But the latter Government adds in its Submission a demand that the asylum should cease ' in order that Peruvian justice may resume its normal course which has been suspended '. This addition appears to involve, indirectly, a claim for the surrender of the refugee. For the reasons given above, this part of the Submission of the Government of Peru cannot be accepted.

" The Court has thus arrived at the conclusion that the asylum must cease, but that the Government of Colombia is under no obligation to bring this about by surrendering the refugee to the Peruvian authorities. There is no contradiction between these two findings, since surrender is not the only way of terminating asylum.

" Having thus defined in accordance with the Havana Convention the legal relations between the Parties with regard to the matters referred to it, the Court has completed its task. It is unable to give any practical advice as to the various courses which might be followed with a view to terminating the asylum, since, by doing so, it would depart from its judicial function. But it can be assumed that the Parties, now that their mutual legal relations have been made clear, will be able to find a practical and satisfactory solution by seeking guidance from those considerations of courtesy and good-neighbourliness which, in matters of asylum, have always held a prominent place in the relations between the Latin-American republics."

On the subject of the right of intervention by the Government of Cuba the Court said :

" The Government of Cuba, availing itself of the right which Article 63 of the Statute of the Court confers on States parties to a convention, filed a Declaration of Intervention with the Registry on March 13th, 1951, and attached thereto a Memorandum in which it stated its views in regard to the interpretation of the Havana Convention of 1928 ratified by it and also its general attitude towards asylum. The Court considered that this Memorandum was regarded by the Government of Cuba as constituting the written observations provided for in paragraph 4 of Article 66 of the Rules of Court.

" The Government of Peru contended that the intervention of the Government of Cuba was inadmissible, owing to the Declaration of Intervention being out of time, and to the fact that the Declaration and the Memorandum accompanying it did not constitute an intervention in the true meaning of the term, but an attempt by a third State to appeal against the Judgment delivered by the Court on November 20th, 1950.

"In regard to that question, the Court observes that every intervention is incidental to the proceedings in a case; it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings. The subject-matter of the present case differs from that of the case which was terminated by the Judgment of November 20th, 1950: it concerns a question—the surrender of Haya de la Torre to the Peruvian authorities—which in the previous case was completely outside the Submissions of the Parties, and which was in consequence in no way decided by the above-mentioned Judgment.

"In these circumstances, the only point which it is necessary to ascertain is whether the object of the intervention of the Government of Cuba is in fact the interpretation of the Havana Convention in regard to the question whether Colombia is under an obligation to surrender the refugee to the Peruvian authorities.

"On that point, the Court observes that the Memorandum attached to the Declaration of Intervention of the Government of Cuba is devoted almost entirely to a discussion of the questions which the Judgment of November 20th, 1950, had already decided with the authority of *res judicata*, and that, to that extent, it does not satisfy the conditions of a genuine intervention. However, at the public hearing on May 15th, 1951, the Agent of the Government of Cuba stated that the intervention was based on the fact that the Court was required to interpret a new aspect of the Havana Convention, an aspect which the Court had not been called on to consider in its Judgment of November 20th, 1950.

"Reduced in this way, and operating within these limits, the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute, and the Court, having deliberated on the matter, decided on May 16th to admit the intervention in pursuance of paragraph 2 of Article 66 of the Rules of Court."

[Report: *I.C.J. Reports*, 1951, p. 71.]

D—CONSULS

II.—Position and Functions of Consuls

Case No. 114 **Consuls—Functions of—Service of Writs—Conditions to be Observed if Service is to be Valid—The Law of South Africa.**

MEYER *v.* MEYER.

South Africa, Supreme Court, Eastern Districts Local Division.
(Jennett J.)
August 16, 1951.

THE FACTS.—Meyer had obtained an order for restitution of conjugal rights or, failing that, divorce, against his wife. She lived in Italy. Service of the order was undertaken by the Acting British Consul in Turin. On the day appointed for the hearing of the divorce proceedings the question arose whether the return of service was valid. This took the form of an endorsement on the restitution order, signed by the Acting British Consul, and stating that he had served the order personally on Mrs. Meyer.

Held: that the return of service was defective. It had not been made by a person whose declaration of such service was sufficient under South African law, nor did it state that the order had been served in accordance with local law. The Judge said:

" The question arises whether the return of service is to be regarded as acceptable. I think it clearly is not. Italy is one of the countries designated by the Minister of Justice in Government Notice 1361 of 11th September, 1936, as those to which the Union Rules relating to service and promulgated by Government Notice 786 of 7th June, 1935, are to apply. Rules 3 and 4 of those Rules have been replaced by Rules promulgated in Government Notice 135 of 20th January, 1950. It is Rule 4 that is relevant. It provides that proof of service shall be deemed sufficient, if it consists of a certificate or declaration by the Union diplomatic or consular officer in the foreign country concerned to the effect that the order has been personally served in conformity with the law of that country. A similar certificate, properly authenticated for use in the Union by a competent official of the foreign country or an advocate, attorney or other legal practitioner charged with the process of service by the foreign country concerned, shall also be deemed sufficient.

" The return of service in the present case is faulty in two respects. In the first place it is not made by one of the persons whose certificate or declaration is regarded as sufficient in terms of the Rule referred to; in the second place it does not show that the service has been in conformity with the laws of Italy. . . ."

[Report: [1951] (4) S.A. 1 [E].]

Consuls—Functions of—Evidential Value of Consular Certificate—The Law of Israel.

Case No. 11

GOUDSMIT *v.* BOASSON.

Israel, Tel Aviv District Court. January 22, 1951.

THE FACTS.—This was a probate application in which the original will had not been lodged in Court. The testator was of Dutch nationality and expert evidence was given to the effect that under Dutch law a will may be executed either before a notary or before a Consul, and that in the latter circumstance the Consul retains the original will in the consulate, handing the parties certified copies thereof. After the testator's death this certified copy is considered the last will and testament. In the present case, a copy of the will duly certified by the Consul accompanied by an affidavit from a member of the staff of the Netherlands Consulate, who had witnessed the original will, was before the Court.

Held: that the copy of the will could be admitted to probate, the Court saying: "The function of a Consul regarding the acceptance of wills and the remission of copies is a notarial function, and the power of foreign consuls in Israel in these matters is recognized by the Personal Status (Consular Powers) Regulations of December 1, 1922 (Drayton, *Laws of Palestine*, vol. 3, p. 2604). It may be added that a copy of a will duly certified by a foreign Consul may be regarded as a public document within the meaning of s. 20 of the Evidence Ordinance."

[Report: *Pesakim Mehoziim*, 5 (1951–1952), p. 551.]

III.—Privileges and Immunities of Consuls

Consuls—Privileges and Immunities of—Transporting Diplomatic Bag—Immunity from Civil Jurisdiction.

Case No. 11

LATERRADE *v.* SANGRO Y TORRES.

France, Court of Appeal of Paris. November 22, 1951.

THE FACTS.—This was an action, arising out of an accident, against the Spanish Consul in Paris. The defendant entered a plea to the jurisdiction. It was contended on his behalf, first,

Case No. 116 *Contd.* that as Spanish Consul he enjoyed immunity from civil jurisdiction, and, secondly, that at the time of the accident he was transporting the Spanish diplomatic bag, as representative of the Government of Spain and with the agreement of the French authorities.

Held: that the plea must be rejected. The defendant did not enjoy any immunity from civil jurisdiction. The Court said:

"The transport of the diplomatic bag is not part of the normal functions of a consul. The plea to the jurisdiction, in so far as it is based on this act, cannot be upheld by the Court.

"The defendant relies chiefly on Article 42 of the Franco-Spanish Convention of March 27, 1862, which provides that 'consuls-general, consuls and vice-consuls who are nationals of the appointing State shall enjoy personal immunity and not be liable to arrest or imprisonment except for crimes; provided that in cases where such agents are nationals of the country of their residence, as traders, their immunity relates only to debts and other civil actions . . . which do not relate to their non-commercial establishment'. However, according to the interpretation of that text by the French Government (dated November 25 and December 4, 1911), 'personal immunity' does not mean immunity from jurisdiction, but only exemption (except in case of crime) from arrest and preventive detention in the country where the agent exercises his functions. In a judgment of February 23, 1913, the Supreme Court held that that interpretation was binding on French courts. The plea to the jurisdiction of the Court raised by M. Sangro y Torres must therefore be rejected by the Court."

[Report: *Sirey, Jurisprudence*, 1952, p. 155.]

E—MISCELLANEOUS

International Organizations—Immunities of—Assets of Defunct International Organization.

See Case No. 144 (*Weiss* v. *International Institute of Intellectual Co-operation*, Note 3).

PART VIII

TREATIES

I.—Conception and Function of Treaties

Treaties—Conception and Kinds of—Agreement between Allied Country and Allied Supreme Command—Provisional and Temporary Agreements—Agreement on Settlement of Claims arising from Torts Committed by Members of Foreign Armed Forces—The Law of Luxemburg. **Case No. 11**

OFFICE D'AIDE MUTUELLE INTERALLIÉE (OMA) *v.* KOERPERICH.

Luxemburg, High Court of Justice. July 4, 1951.

THE FACTS.—An Agreement concluded between the Government of Luxemburg and the Allied Supreme Command on July 14, 1944, made provision for the indemnification of Luxemburg nationals in respect of damage suffered by them by reason of torts committed by members of the Allied armed forces stationed in the Grand-Duchy of Luxemburg. A Luxemburg Decree of January 22, 1945, the purpose of which was to implement the Agreement, provided for the setting up of an institution to be known as the " Office d'Aide Mutuelle Interalliée " (hereinafter referred to as " OMA "), and the relevant part of the Decree provided that " OMA shall deal with the settlement of any claims against the Allied military authorities . . . to the extent that the action of the Luxemburg authorities . . . shall be required ". The Agreement of July 14, 1944, was not ratified by the Parliament of Luxemburg. The respondent, a Luxemburg national, who had sustained personal injuries at the hands of two members of the United States armed forces stationed in Luxemburg, lodged a claim with OMA for the payment of 80,000 francs by way of damages. He was awarded 25,000 francs, and thereupon brought an action against OMA in the District Court of Luxemburg for the payment of a further sum of 55,000 francs. The District Court gave judgment in his favour, and OMA now appealed, contending on appeal that the District Court should not have exercised jurisdiction in the matter, having regard to the Agreement of July 14, 1944, and that in any event the Courts of Luxemburg were not competent to adjudicate upon facts which occurred in connection with the functions of a foreign administration. On behalf of the respondent it was contended that as the Agreement of July 14, 1944, was a Treaty which had not been ratified by the Parliament of

Case No. 117 *Contd.* Luxemburg, as provided in Article 37 of the Luxemburg Constitution, it was not binding on the Courts of Luxemburg, and that the District Court had therefore rightly ignored it.

Held: (i) that, notwithstanding that the Agreement had not been ratified, it was binding on the Courts of Luxemburg, on the ground that it was not a treaty but only an agreement of a " temporary and provisional character " ;

(ii) that, accordingly, the District Court should not have ignored the Agreement and should, in accordance therewith, have refused to exercise jurisdiction ;

(iii) that, in any event, claims of this kind were not subject to the jurisdiction of the Courts of Luxemburg ;

(iv) that the appeal must therefore be allowed.

The Court said : " The Grand-Ducal Decree of January 22, 1945, is based on an Agreement concluded on July 14, 1944, between the Supreme Command of the Allied Expeditionary Forces and the Government of the Grand-Duchy of Luxemburg. It is the object of this Agreement to ensure that the inhabitants of the liberated territories shall be indemnified in respect of damage caused by members of the Allied Forces, provided that such damage is unconnected with the conduct of the war. In the execution of this Agreement the Decree of January 22, 1945, has laid down the procedure to be observed in the examination and settlement of claims that may arise as a result of the occupation of the country by the Allied armies. To achieve these objects, Article 3 gives OMA the right ' to conclude contracts, for and on behalf of the State of Luxemburg, with regard to all matters concerning supplies and services in connection with Mutual Aid. OMA shall make all payments necessitated by the execution of such contracts. *Vis-à-vis* individuals, the transactions of OMA are deemed to be commercial transactions unless they serve the purpose of requisitions.' In contradistinction to Article 3, which restrictively enumerates those matters for the settlement of which the State of Luxemburg has substituted itself for the foreign Allied State, Article 4 limits the function of OMA to a duty to deal with the settlement of any claims to the extent that it shall be required to do so by the Allied military authorities. It follows from a comparison between Articles 3 and 4 that the State of Luxemburg has not substituted itself for the Allied military authorities in so far as concerns the settlement of claims, and that in the latter case the function of OMA is limited to that of an intermediary between individual Luxemburg nationals and the Allied military authorities or of an agent who has to carry out the decisions made by the Claims Commissions. . . . The Courts of Luxemburg are not entitled to exercise jurisdiction over events which occurred in connection with the functioning of a foreign service, even if the event took place on Luxemburg territory, unless the State of Luxemburg has substituted itself for the foreign State concerned. It follows that the Judge of the District Court was wrong in exercising jurisdiction over this dispute, having regard to the absence of substitution of the State of Luxemburg for the United States of America. The Judge of the District Court was also wrong in excluding from the oral proceedings concerning the interpretation of the Decree of January 22, 1945, the agreements concluded between the Grand-Duchy and the Allied military authorities, by treating them as secret treaties which have not been ratified by Parliament. In fact, these agreements, by reason of their temporary and provisional character, are only arrangements of minor interest which do not require parliamentary approval."

[Report : *Pasicrisie luxembourgeoise*, vol. XV, p. 149.]

III.—Conclusion of Treaties. Signature. Accession and Adhesion. Tacit Renewal

Treaties—Conclusion of—Treaty Not Freely Negotiated.

See Case No. 129 (*Pertusola Claim*).

Treaties—Various Kinds of—Concessionary Agreement between Ruler and Private Company—Interpretation of—Proper Law of the Contract.

See Case No. 37 (*Petroleum Development Ltd.* v. *Sheikh of Abu Dhabi*).

IV.—Conditions of Validity of Treaties. Registration of Treaties

Treaties—Validity of—Effect of Duress—Munich Pact of 1938—Czechoslovakia.

See Case No. 63 (*Nederlands Beheers-Instituut* v. *Nimwegen and Männer*).

VII.—Reservations

Case No. 118 **Treaties—Conclusion of—Reservations—Objection to Reservation—Whether State Making the Reservation Can be Regarded as Party to the Convention—Right to Make Reservations—Absence of Specific Conventional Provision on the Subject—Relevance of Object of the Convention—Relevance of Universality as Object of the Convention—Requirement of Express or Tacit Assent of the Contracting Parties—Effect of Reservation in relation (*a*) to Parties Objecting to the Reservation and (*b*) to Parties who Accept It—Objection Made by a Signatory who has Not Ratified the Convention—Objection Made by a Party Entitled to Accede who has Not Yet Done So—Reservations to Genocide Convention—Advisory Jurisdiction—Competence of the Court—Request by a Body which is not a Party to the Convention.**

Reservations to the Convention on Genocide.

International Court of Justice.

(Basdevant, President ; Guerrero, Alvarez, Hackworth, Winiarski, Zoričić, De Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Read, Hsu Mo, Judges.)

Advisory Opinion of May 28, 1951.

The Facts.—On November 16, 1950, the General Assembly of the United Nations adopted the following Resolution :

" The General Assembly,

Having examined the report of the Secretary-General regarding reservations to multilateral conventions,

Considering that certain reservations to the Convention on the Prevention and Punishment of the Crime of Genocide have been objected to by some States,

Considering that the International Law Commission is studying the whole subject of the law of treaties, including the question of reservations,

Considering that different views regarding reservations have been expressed during the fifth session of the General Assembly, and particularly in the Sixth Committee,

1. Requests the International Court of Justice to give an Advisory Opinion on the following questions :

In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification :

I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others ?

II. If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and :
(*a*) The parties which object to the reservation ?
(*b*) Those which accept it ?

III. What would be the legal effect as regards the answer to Question I if an objection to a reservation is made :
(*a*) By a signatory which has not yet ratified ?
(*b*) By a State entitled to sign or accede but which has not yet done so ? "

Other relevant facts are stated in the Opinion of the Court as reproduced below.

Held :

" *On Question I :* by seven votes to five, that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention ; otherwise, that State cannot be regarded as being a party to the Convention.

" *On Question II :* by seven votes to five,

" (*a*) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention ;

" (*b*) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention ;

" *On Question III :* by seven votes to five,

" (*a*) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State ;

" (*b*) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect."

Vice-President Guerrero, Judges Sir Arnold McNair, Read and Hsu Mo, while agreeing that the Court had competence to give an Opinion, declared that they were unable to concur in the Opinion of the Court and availed themselves of the right conferred on them by Articles 57 and 68 of the Statute and appended to the Opinion the common statement of their dissenting opinion.

Judge Alvarez appended a separate statement of his dissenting opinion.

Case No. 118 *Contd.*

The Court said :

[I. *Competence to Render an Advisory Opinion. Request by a Body which is not a Party to the Convention.*]

" In the communications which they have addressed to the Court, certain governments have contended that the Court is not competent to exercise its advisory functions in the present case.

" A first objection is founded on the argument that the making of an objection to a reservation made by a State to the Convention on the Prevention and Punishment of the Crime of Genocide constitutes a dispute and that, in order to avoid adjudicating on that dispute, the Court should refrain from replying to Questions I and II. In this connection, the Court can confine itself to recalling the principles which it laid down in its Opinion of March 30th, 1950 (I.C.J. Reports 1950, p. 71). A reply to a request for an Opinion should not, in principle, be refused. The permissive provision of Article 65 of the Statute recognizes that the Court has the power to decide whether the circumstances of a particular case are such as to lead the Court to decline to reply to the request for an Opinion. At the same time, Article 68 of the Statute recognizes that the Court has the power to decide to what extent the circumstances of each case must lead it to apply to advisory proceedings the provisions of the Statute which apply in contentious cases. The object of this request for an Opinion is to guide the United Nations in respect of its own action. It is indeed beyond dispute that the General Assembly, which drafted and adopted the Genocide Convention, and the Secretary-General, who is the depositary of the instruments of ratification and accession, have an interest in knowing the legal effects of reservations to that Convention and more particularly the legal effects of objections to such reservations.

" Following a similar line of argument, it has been contended that the request for an opinion would constitute an inadmissible interference by the General Assembly and by States hitherto strangers to the Convention in the interpretation of that Convention, as only States which are parties to the Convention are entitled to interpret it or to seek an interpretation of it. It must be pointed out in this connection that, not only did the General Assembly take the initiative in respect of the Genocide Convention, draw up its terms and open it for signature and accession by States, but that express provisions of the Convention (Articles XI and XVI) associate the General Assembly with the life of the Convention ; and finally, that the General Assembly actually associated itself with it by endeavouring to secure the adoption of the Convention by as great a number of States as possible. In these circumstances, there can be no doubt that the precise determination of the conditions for participation in the Convention constitutes a permanent interest of direct concern to the United Nations which has not disappeared with the entry into force of the Convention. Moreover, the power of the General Assembly to request an Advisory Opinion from the Court in no way impairs the inherent right of States parties to the Convention in the matter of its interpretation. This right is independent of the General Assembly's power and is exercisable in a parallel direction. Furthermore, States which are parties to the Convention enjoy the faculty of referring the matter to the Court in the manner provided in Article IX of the Convention.

" Another objection has been put forward to the exercise of the Court's advisory jurisdiction : it is based on Article IX of the Genocide Convention which provides that disputes relating to the interpretation, application or fulfilment of that Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. It has been contended that there exists no dispute in the present case and that, consequently, the effect of Article IX is to deprive the Court, not only of any contentious jurisdiction, but also of any power to give an Advisory Opinion. The Court cannot share this view. The existence of a procedure for the settlement of disputes, such as that provided by Article IX, does not in itself exclude the Court's advisory jurisdiction, for Article 96 of the Charter confers upon the General Assembly and the Security Council in general terms the right to request this Court to give an Advisory Opinion ' on any legal question '. Further, Article IX, before it can be applied, presupposes the status of ' contracting parties ' ; consequently, it cannot be invoked against a request for an Opinion the very object of which is to determine, in relation to reservations and objections thereto, the conditions in which a State can become a party.

" In conclusion, the Court considers that none of the above-stated objections to the exercise of its advisory function is well founded."

[II. *Objection to Reservations. Object of Convention.*]

" The Court observes that the three questions which have been referred to it for an Opinion have certain common characteristics.

" All three questions are expressly limited by the terms of the Resolution of the General Assembly to the Convention on the Prevention and Punishment of the Crime of Genocide, and the same Resolution invites the International Law Commission to study the general question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law. The questions thus having a clearly defined object, the replies which

Case No. 118 *Contd.* the Court is called upon to give to them are necessarily and strictly limited to that Convention. The Court will seek these replies in the rules of law relating to the effect to be given to the intention of the parties to multilateral conventions.

" The three questions are purely abstract in character. They refer neither to the reservations which have, in fact, been made to the Convention by certain States, nor to the objections which have been made to such reservations by other States. They do not even refer to the reservations which may in future be made in respect of any particular article ; nor do they refer to the objections to which these reservations might give rise

" Question I is framed in the following terms :

> ' Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others ? '

" The Court observes that this question refers, not to the possibility of making reservations to the Genocide Convention, but solely to the question whether a contracting State which has made a reservation can, while still maintaining it, be regarded as being a party to the Convention, when there is a divergence of views between the contracting parties concerning this reservation, some accepting the reservation, others refusing to accept it.

" It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.

" This concept, which is directly inspired by the notion of contract, is of undisputed value as a principle. However, as regards the Genocide Convention, it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle. Among these circumstances may be noted the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention. Extensive participation in conventions of this type has already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations—all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions.

" It must also be pointed out that although the Genocide Convention was finally approved unanimously, it is nevertheless the result of a series of majority votes. The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations. This observation is confirmed by the great number of reservations which have been made of recent years to multilateral conventions.

" In this state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations. Account should also be taken of the fact that the absence of such an article or even the decision not to insert such an article can be explained by the desire not to invite a multiplicity of reservations. The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect.

" Although it was decided during the preparatory work not to insert a special article on reservations, it is none the less true that the faculty for States to make reservations was contemplated at successive stages of the drafting of the Convention. In this connection, the following passage may be quoted from the comments on the draft Convention prepared by the Secretary-General : '. . . (1) It would seem that reservations of a general scope have no place in a convention of this kind which does not deal with the private interests of a State, but with the preservation of an element of international order . . . ; (2) perhaps in the course of discussion in the General Assembly it will be possible to allow certain limited reservations.'

" Even more decisive in this connection is the debate on reservations in the Sixth Committee at the meetings (December 1st and 2nd, 1948) which immediately preceded the adoption of the Genocide Convention by the General Assembly. Certain delegates clearly announced that their governments could only sign or ratify the Convention subject to certain reservations.

" Furthermore, the faculty to make reservations to the

Case No. 118 *Contd.*

Convention appears to be implicitly admitted by the very terms of Question I.

"The Court recognizes that an understanding was reached within the General Assembly on the faculty to make reservations to the Genocide Convention and that it is permitted to conclude therefrom that States becoming parties to the Convention gave their assent thereto. It must now determine what kind of reservations may be made and what kind of objections may be taken to them.

"The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.

"The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

" The foregoing considerations, when applied to the question of reservations, and more particularly to the effects of objections to reservations, lead to the following conclusions.

" The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.

" Any other view would lead either to the acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in mind, or to recognition that the parties to the Convention have the power of excluding from it the author of a reservation, even a minor one, which may be quite compatible with those purposes.

" It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention."

[III. *Requirement of Express or Tacit Consent of All Contracting Parties.*]

" On the other hand, it has been argued that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties. This theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted. This view,

Case No. 118 *Contd.*

however, cannot prevail if, having regard to the character of the convention, its purpose and its mode of adoption, it can be established that the parties intended to derogate from that rule by admitting the faculty to make reservations thereto.

" It does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law. The considerable part which tacit assent has always played in estimating the effect which is to be given to reservations scarcely permits one to state that such a rule exists, determining with sufficient precision the effect of objections made to reservations. In fact, the examples of objections made to reservations appear to be too rare in international practice to have given rise to such a rule. It cannot be recognized that the report which was adopted on the subject by the Council of the League of Nations on June 17th, 1927, has had this effect. At best, the recommendation made on that date by the Council constitutes the point of departure of an administrative practice which, after being observed by the Secretariat of the League of Nations, imposed itself, so to speak, in the ordinary course of things on the Secretary-General of the United Nations in his capacity of depositary of conventions concluded under the auspices of the League. But it cannot be concluded that the legal problem of the effect of objections to reservations has in this way been solved. The opinion of the Secretary-General of the United Nations himself is embodied in the following passage of his report of September 21st, 1950: ' While it is universally recognized that the consent of the other governments concerned must be sought before they can be bound by the terms of a reservation, there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State's objecting to a reservation.'

" It may, however, be asked whether the General Assembly of the United Nations, in approving the Genocide Convention, had in mind the practice according to which the Secretary-General, in exercising his functions as a depositary, did not regard a reservation as definitively accepted until it had been established that none of the other contracting States objected to it. If this were the case, it might be argued that the implied intention of the contracting parties was to make the effectiveness of any reservation to the Genocide Convention conditional on the assent of all the parties.

" The Court does not consider that this view corresponds to reality. It must be pointed out, first of all, that the existence of an administrative practice does not in itself constitute a decisive factor in ascertaining what views the contracting States to the Genocide Convention may have had concerning the rights and duties resulting therefrom. It must also be pointed out that there existed among the American States members both of the United Nations and of the Organization of American States, a different practice which goes so far as to permit a reserving State to become a party irrespective of the nature of the reservations or of the objections raised by other contracting States. The preparatory work of the Convention contains nothing to justify the statement that the contracting States implicitly had any definite practice in mind. Nor is there any such indication in the subsequent attitude of the contracting States: neither the reservations made by certain States nor the position adopted by other States towards those reservations permit the conclusion that assent to one or the other of these practices had been given. Finally, it is not without interest to note, in view of the preference generally said to attach to an established practice, that the debate on reservations to multilateral treaties which took place in the Sixth Committee at the fifth session of the General Assembly reveals a profound divergence of views, some delegations being attached to the idea of the absolute integrity of the Convention, others favouring a more flexible practice which would bring about the participation of as many States as possible.

" It results from the foregoing considerations that Question I, on account of its abstract character, cannot be given an absolute answer. The appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case."

[IV. *Effect of Reservations in Relation to Parties Objecting to or Accepting the Reservation.*]

" Having replied to Question I, the Court will now examine Question II, which is framed as follows :

' If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and :
(*a*) the parties which object to the reservation ?
(*b*) those which accept it ? '

" The considerations which form the basis of the Court's reply to Question I are to a large extent equally applicable here. As has been pointed out above, each State which is a party to the Convention is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint. As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention. In the ordinary course of events, such a decision will only affect the relationship between the State making the reservation and the objecting State ; on the other

Case No. 118 *Contd.* hand, as will be pointed out later, such a decision might aim at the complete exclusion from the Convention in a case where it was expressed by the adoption of a position on the jurisdictional plane.

" The disadvantages which result from this possible divergence of views—which an article concerning the making of reservations could have obviated—are real ; they are mitigated by the common duty of the contracting States to be guided in their judgment by the compatibility or incompatibility of the reservation with the object and purpose of the Convention. It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention ; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application.

" It may be that the divergence of views between parties as to the admissibility of a reservation will not in fact have any consequences. On the other hand, it may be that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by the procedure laid down in Article IX of the Convention.

" Finally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.

" Such being the situation, the task of the Secretary-General would be simplified and would be confined to receiving reservations and objections and notifying them."

[V. *Effect of Objection by a Signatory which has not ratified the Convention and of a State Entitled to Accede but which has not yet done so.*]

" Question III is framed in the following terms :

' What would be the legal effect as regards the answer to Question I if an objection to a reservation is made :

(*a*) By a signatory which has not yet ratified ?
(*b*) By a State entitled to sign or accede but which has not yet done so ? '

" The Court notes that the terms of this question link it to Question I. This link is regarded by certain States as presupposing a negative reply to Question I.

" The Court considers, however, that Question III could arise in any case. Even should the reply to Question I not tend to exclude, from being a party to the Convention, a State which has made a reservation to which another State has objected, the fact remains that the Convention does not enter into force as between the reserving State and the objecting State. Even if the objection has this reduced legal effect, the question would still arise whether the States mentioned under (*a*) and (*b*) of Question III are entitled to bring about such a result by their objection.

" An extreme view of the right of such States would appear to be that these two categories of States have a *right to become* parties to the Convention, and that by virtue of this right they may object to reservations in the same way as any State which is a party to the Convention with full legal effect, *i.e.* the exclusion from the Convention of the reserving State. By denying them this right, it is said, they would be obliged either to renounce entirely their right of participating in the Convention, or to become a party to what is, in fact, a different convention. The dilemma does not correspond to reality, as the States concerned have always a right to be parties to the Convention in their relations with other contracting States.

" From the date when the Genocide Convention was opened for signature, any Member of the United Nations and any non-member State to which an invitation to sign had been addressed by the General Assembly, had the *right to be a party* to the Convention. Two courses of action were possible to this end : either signature, from December 9th, 1948, until December 31st, 1949, followed by ratification, or accession as from January 1st, 1950 (Article XI of the Convention). The Court would point out that the right to become a party to the Convention does not express any very clear notion. It is inconceivable that a State, even if it has participated in the preparation of the Convention, could, before taking one or the other of the two courses of action provided for becoming a party to the Convention, that State cannot claim such a right from its status as a Member of the United Nations or from the invitation to sign which has been addressed to it by the General Assembly.

" The case of a signatory State is different. Without going into the question of the legal effect of signing an international convention, which necessarily varies in individual cases, the Court considers that signature constitutes a first step to participation in the Convention.

" It is evident that without ratification, signature does not make the signatory State a party to the Convention ; nevertheless, it establishes a provisional status in favour of that State. This status may decrease in value and importance after the Convention enters into force. But, both before and after the entry into force, this status would justify more favourable treatment being meted out to signatory States in respect of

Case No. 118 *Contd.*

objections than to States which have neither signed nor acceded.

" As distinct from the latter States, signatory States have taken certain of the steps necessary for the exercise of the right of being a party. Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification.

" Until this ratification is made, the objection of a signatory State can therefore not have an immediate legal effect in regard to the reserving State. It would merely express and proclaim the eventual attitude of the signatory State when it becomes a party to the Convention.

" The legal interest of a signatory State in objecting to a reservation would thus be amply safeguarded. The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect and consequently, it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation. In the circumstances, it is of little importance whether the ratification occurs within a more or less long time-limit. The resulting situation will always be that of a ratification accompanied by an objection to the reservation. In the event of no ratification occurring, the notice would merely have been in vain."

[Report : *I.C.J. Reports*, 1951, p. 15.]

NOTE.—Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo delivered a Joint Dissenting Opinion in the following terms :

" We regret that we are unable to concur in the Opinion of the Court, while agreeing that the Court has competence to give an Opinion.

" We also consider that the rôle of the Court in this matter is a limited one. The Court is not asked to state which is in its opinion the best system for regulating the making of reservations to multilateral conventions. States engaged in the preparation of a multilateral convention, by means either of a diplomatic conference or of the machinery of the United Nations, are free to insert in the text provisions defining the limits within which, and the means by which, reservations can be proposed and can take effect. With these questions of policy the Court is not concerned. Its Opinion is requested as to the existing law and its operation upon reservations to the Genocide Convention, which contains no express provision to govern this matter. But the Court cannot overlook the possibility that its Opinion may have a wider effect—more particularly having regard to the fact that Dr. Kerno, the representative of the Secretary-General of the United Nations, in addressing the Court, treated the matter generally and expressed the hope that the Opinion would be useful in dealing with the general problem of reservations to multilateral conventions.

" The three questions are described in the majority Opinion as ' purely abstract '. They are abstract in the sense that they do not mention any particular States or any particular reservations. We consider, however, that it will make our examination of the problem more realistic if we state that before the end of 1950 the Secretary-General had received notice of eighteen reservations, proposed, some by one State, some by another, the total number of States being eight, and that those reservations relate to Article IV (removal of any jurisdictional immunities of 'constitutionally responsible rulers, public officials or private individuals'), Article VI (jurisdiction of municipal tribunals), Article VII (extradition), Article IX (the compulsory jurisdiction of the International Court of Justice), and Article XII (the 'colonial clause'). Every one of the eight reserving States has made a reservation against, or in regard to, Article IX.

" In considering the requirements of international law as to the proposal of reservations and the conditions of their effectiveness, the Court is not confronted with a legal vacuum. The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservation or at the same time or later. The fact that in so many of the multilateral conventions of the past hundred years, whether negotiated by groups of States or the League of Nations or the United Nations, the parties have agreed to create new rules of law or to declare existing rules of law, with the result that this activity is often described as 'legislative' or 'quasi-legislative', must not obscure the fact that the legal basis of these conventions, and the essential thing that brings them into force, is the common consent of the parties.

" The practice of proposing reservations to treaties (though the word 'reservations' is not always used) is at least a century old, but it did not receive much attention from legal writers until the present century. The following quotations show clearly that the practice of governments has resulted in a rule of law requiring the unanimous consent of all the parties to a treaty before a reservation can take effect and the State proposing it can become a party.

" (*a*) From Fauchille : *Traité de droit international public* (tome I, 3^{me} partie, paragraphe 823[1]), published in 1926, the following passage may be extracted [*translation from French*] :

> ' In our opinion, reservations on signature are not admissible unless all the contracting States agree to accept them, whether expressly or tacitly : the final result would be a new treaty, quite different from that first negotiated. If the States which sign without reservations do not agree, they will be entitled to insist that the contracting States which made reservations must either withdraw them or accept the position that the convention will not apply in relation to other interested States.'

" (*b*) Sir William Malkin, in his article entitled 'Reservations to Multilateral Conventions', in the *British Year Book of International Law* of 1926, at page 159, traced the gradual development, during the previous half century and more, of the practice of proposing reservations and the variety of forms which it has taken. He concluded as follows :

> ' It will be seen that of all the cases examined above where an actual reservation was made to any provision of a convention, there is hardly one as to which it cannot be shown that the consent of the other contracting Powers was given either expressly or by implication. Where the reservation is embodied in a document (which must have formed the subject of previous discussion and agreement) signed by the representatives of the other contracting Powers, consent is express ; where the reservation had been previously announced at a sitting of the conference and was repeated at the time of signature without any objection being taken, consent is

Case No. 118 *Contd.*

implied. And certainly there is no case among those examined which could be quoted as a precedent in favour of the theory that a State is entitled to make any reservations it likes to a convention without the assent of the other contracting parties.'

" (*c*) From Hildebrando Accioly, *Tratado di direito internacional publico*, published in 1934 (p. 448) [*translation from Portuguese*] :

> ' 1288. Be that as it may, the general principle which is universally accepted is that ratification cannot be made subject to reservations, whether by the ratifying authority, or by the constitutional organ competent to authorize ratification, unless the other contracting parties agree to these reservations, or provision is made in the treaty itself for reservations. This principle was enshrined a few years ago in a resolution adopted by the Assembly of the League of Nations on September 25th, 1931, on the subject of the entry into force of the Protocol concerning the Revision of the Statute of the Permanent Court of International Justice.' (The said resolution is expressed as follows : ' The Assembly considers that a reservation can only be made at the moment of ratification if all the other signatory States agree or if such a reservation has been provided for in the text of the Convention.') (League of Nations, *Official Journal*, Special Supplement No. 92, October 1931, p. 10.)

" (*d*) From Podesta Costa, *Manual de derecho internacional público* (2a edición) (1947), page 189 [*translation from Spanish*] :

> ' The presentation of a reserve is tantamount to a new proposal made to the other party. If the latter accepts it, a consensus of opinion exists and a new clause is embodied in the treaty ; if the latter does not accept it, there is only a unilateral expression of intention which cannot constitute a source of obligations. This is the basic rule which governs the matter.'

" The application of this rule in practice is illustrated by the Slavery Convention of 1926. It was an important humanitarian convention and, after prolonged study of slavery by the League of Nations Assembly, a convention was drafted by a committee appointed by the Assembly. It was approved by the Assembly on September 25th, 1926 (apparently without dissent), and then opened for signature, ratification and accession. On August 11th, 1930, the Secretary-General made a report (A.17.1930.VI) upon the state of the signatures, ratifications and accessions. The following passage may be extracted from page 2 of this document :

> ' The accessions by *Hungary* (April 16th, 1927) and by the *United States of America* (March 21st, 1929) were given with certain reservations, which have been submitted for acceptance to the parties to the Convention. Fourteen States have not yet replied as regards the Hungarian reservations ; ten replies have still to be received regarding the United States reservations.'

" In the annexed list of ratifications and accessions appear the names of the United States of America and Hungary, subject, in each case, to the following note :

> ' Subject to a reservation which has been submitted to the signatory States for acceptance.'

" On page 6 of the same document is printed a letter to the Secretary-General from the Hungarian Delegation, containing the following passage :

> ' (*b*) The Hungarian Government has already made known its accession to the Convention on Slavery of September 25th, 1926.

> This accession will become effective as soon as the governments of the following countries have declared their acceptance of the reservation made by Hungary at the time of her accession. . . .' [Here follow the names of eleven countries.]

" In 1927 the law and practice as to reservations engaged the attention of the Council of the League of Nations. In 1925 the Austrian Government had attached a reservation to its signature of the Convention on Opium and Drugs of that year to which, with other States, Austria had been invited to become a party. (This humanitarian convention, which has much in common with the Genocide Convention in point of structure, was negotiated at conferences held under the auspices of the League of Nations.) That reservation involved the non-acceptance of certain obligations which formed part of the system of control of the drug traffic devised by the Conference. It was disputed whether or not Austria could make this reservation without obtaining the assent of the States which were parties to the Convention. The matter was referred by the Council of the League of Nations to the League Committee for the Progressive Codification of International Law, which appointed a Sub-Committee, with M. Fromageot as rapporteur, to study the subject. The Report of that Sub-Committee will be found in League of Nations Document C.357.M.130.1927.V., and the following sentence may be extracted from it :

> ' In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void.'

" Thereupon the Codification Committee approved the Report and sent it to the Council of the League of Nations. The Council adopted it on June 17th, 1927, directed it to be circulated to the Members of the League and requested ' the Secretary-General to be guided by the principles of the Report regarding the necessity for acceptance by all the contracting States when dealing in future with reservations made after the close of a conference at which a convention is concluded, subject, of course, to any special decisions taken by the conference itself '.

" The Council of the League of Nations had, of course, no power to make law. What it did was to give its approval to the statement of the law prepared by the Codification Committee. The law, as thus stated, was followed by the League of Nations thereafter and has later been followed by the United Nations, as we shall see in the case of the Genocide Convention.

" Since 1927, while multilateral conventions have varied (as indeed they did before that date) in regard to clauses dealing with reservations, the rule of law applicable to reservations in the absence of any express provision has remained clear. So far as the activities of the United Nations are concerned, the Secretary-General—who is in a position to know—stated in his Report on ' Reservations to Multilateral Conventions ', dated September 20th, 1950 (A.1372), to the General Assembly :

> ' 5. In the absence of stipulations in a particular convention regarding the procedure to be followed in the making and accepting of reservations, the Secretary-General, in his capacity as depositary, has held to the broad principle that a reservation may be definitively accepted only after it has been ascertained that there is no objection on the part of any of the other States directly concerned. . . .'
>
> ' 7. In following the practice referred to above, the Secretary-General has of course done no more than follow the practice already established by the League of Nations. . . .'

Case No. 118 *Contd.*

" In particular, he cited (in paragraphs 11 to 16 of that Report) four instances of the practice, and it is instructive to note that the first two occurred in the same year as that in which the Genocide Convention was approved by the General Assembly and opened for signature, and before that took place. The first was the reservation which the United States of America desired to attach to its adherence to the Constitution of the World Health Organization. The Secretary-General says (paragraph 12) :

> ' 12. . . . Only after a unanimous acceptance by the [World Health] Assembly of the ratification as not inconsistent with the Constitution did the Secretary-General proceed with his notification that the United States had become a party.'

This Constitution entered into force on April 7th, 1948.

" The second instance is contained in the following paragraph 13 of his Report :

> ' 13. Prior to the entry into force of the Constitution of the International Refugee Organization, the Secretary-General circulated the text of reservations made by several States in accepting that Constitution. Finally, when the last instrument of acceptance necessary to permit the entry into force had been deposited, the Secretary-General so notified the interested States, requesting their observations before a specified date. Only after that date had passed did he declare that the Constitution had entered into force.'

This Constitution entered into force on August 20th, 1948.

" The Genocide Convention was approved by the General Assembly on December 9th, 1948, and was opened for signature two days later.

" The other two instances cited by the Secretary-General relate to reservations made to a Protocol modifying the General Agreement on Tariffs and Trade by the Union of South Africa and Southern Rhodesia in 1949. (These four instances are described in some detail in the *American Journal of International Law*, Vol. 44, January 1950, pp. 120–127.)

" Again, the Secretary-General's representative said to the Court on April 10th, 1951, that

> ' The principle which the Secretary-General has heretofore followed is based on the theory that all the States most directly interested must consent to reservations. . . .'

And early in the course of his speech on April 11th, he said :

> '. . . I should like to emphasize that the Secretary-General's practice is a continuation of that constantly followed by the League of Nations.'

" It has been objected that the statement quoted above from the Report of the Codification Committee made in 1927, which has formed the basis of the practice of the League of Nations and the United Nations since then, is not a rule of law but a mere ' administrative practice '. Upon this, three things may be said : firstly, that the League Codification Committee appear to have regarded it as a rule of law ; secondly, that those responsible for the preparation of the Harvard Research Draft Convention on the Law of Treaties (see Articles 14, 15, 16 and Comment) have accepted the principle of unanimous assent to reservations laid down in 1927 as right ; thirdly, there can be no doubt that this principle, whether it is a rule of law or a rule of practice, was being followed by the United Nations when the Genocide Convention was negotiated and opened for signature.

" While the principle of law governing reservations is clear, it permits negotiating governments the greatest flexibility in making express provisions in treaties. Against this background of principle, the law does not dictate what practice they must adopt, but leaves them free to do what suits them best in the light of the nature of each convention and the circumstances in which it is being negotiated. The following are some illustrations :

" (*a*) The Department of International Law and Organization of the Pan-American Union has submitted to the Court a valuable Statement dated December 14th, 1950, from which it appears that, in the case of treaties negotiated within the framework of the Pan-American Union, when a State, on ratifying a treaty, makes or maintains a reservation, the reservation is communicated to the other signatory States, and the treaty does not enter into force between the reserving State and any State which declines to accept the reservation, but the reserving State nevertheless becomes a party to the treaty.

" There is, however, a significant difference between the Pan-American Union procedure and the United Nations procedure, which is expressed in this Statement as follows :

> ' The Pan-American Union procedure permits a State to proceed with its ratification in spite of the fact that one or more of the signatory States may object to the reservation, *whereas the procedure followed by the Secretary-General of the United Nations has the effect of preventing the particular State from becoming a party to the convention if any single State among those which have already ratified voices its disapproval of the proposed reservation.*' (Italics ours.)

(Evidently the Pan-American Union has no doubt as to what is the procedure of the United Nations and as to its effect.)

" What is important to note is that the Pan-American Union procedure rests upon rules adopted by the Governing Body of the Union, as approved by the International Conference of American States held at Lima in 1938 ; that is to say, it depends on the prior agreement of the contracting parties.

" (*b*) Another procedure is illustrated by the General Act for the Pacific Settlement of International Disputes adopted at Geneva on September 26th, 1928. Article 39 expressly provided that ' a party, in acceding to the present General Act, may make his acceptance conditional upon ' reservations in respect of three kinds of dispute precisely specified in that Article. The same practice was adopted in the Revised General Act adopted by the General Assembly of the United Nations on 28th April 1949.

" Another instance is afforded by Article 64 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms as follows :

> ' 1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.
>
> ' 2. Any reservation made under this Article shall contain a brief statement of the law concerned.'

" Again, the Convention on the Declaration of Death of Missing Persons, of 1950, negotiated by the General Assembly of the United Nations, affords, in Article 19, an example of an express power to attach any reservations to an instrument of accession, coupled with an express provision permitting any contracting State which does not accept any reservation, to notify the Secretary-General ' that it considers such accession as not having entered into force between the State making the reservation and the State not accepting it. In such case

Case No. 118 *Contd.*

the Convention shall be considered as not being in force between such two States.'

" (*c*) Other instances might be noted in which express provisions were included in multilateral conventions, or collateral agreements: prescribing the parts of the conventions to which reservations might freely be made; providing a special measure of control over reservations or a special regimen of consent; or otherwise enabling States to become parties to the conventions with limited obligations. Reference may be made to the following:

Convention on the Simplification of Customs Formalities, Geneva, November 3rd, 1923; Protocol of the same date.
Convention relating to Economic Statistics, Geneva, December 14th, 1926: Art. 17, and Protocol of the same date: as amended by Protocol of December 9th, 1948.
Convention on the Suppression of Counterfeiting Currency, Geneva, April 20th, 1929; Protocol of the same date.
Sanitary Convention for Aerial Navigation, The Hague, April 12th, 1933: Art. 67.
Convention for the Prevention and Punishment of Terrorism, Geneva, November 16th, 1937: Art. 23.
Convention on Road Traffic, Geneva, September 19th, 1949: Art. 2 (1), and Final Act of the Conference on Road and Motor Transport: paragraph 7.
Protocol on Road Signs and Signals, Geneva, September 19th, 1949; and Final Act of the Conference on Road and Motor Transport: paragraph 7.

" In such cases the negotiating governments in effect agree *in advance* they would rather have a State become a party to the convention *minus* certain provisions than not at all. But there is a fundamental difference between reservations permitted in advance by the treaty and *ex post facto* claims by States that such and such a reservation is compatible with the object and purpose of a convention and that, therefore, a State has a unilateral right to make it, subject to its claim being challenged on the ground of compatibility. The fact that there is a recognized method of ear-marking in advance and by agreement those provisions against which a reservation will be permitted is the strongest possible evidence that the governments negotiating the Genocide Convention did not contemplate giving to intending parties a unilateral right of making reservations deemed by them to be compatible with the purpose of the Convention.

" (*d*) Another practice is illustrated by the Havana Convention on Private International Law of 1928 (the Bustamante Code), Article 3 of which provides that:

> ' Each one of the contracting Republics, when ratifying the present Convention, may declare that it reserves acceptance of one or more articles of the annexed Code, and the provisions to which the reservation refers shall not be binding upon it.'

" The value of permitting flexibility to the parties in providing for reservations was remarked upon by the Secretary-General in paragraph 47 (*c*) of his Report to the General Assembly on ' Reservations to Multilateral Conventions ', dated 20th September, 1950, which is as follows:

> ' It is inevitable that any rule followed by the Secretary-General, in the absence of express provisions in the convention, will not suit the circumstances of every convention or every relationship proposed between given parties. This difficulty can be met by the conscious use, in the drafting of such a convention, of final articles best adapted to any special situation. *If, for example, it is desired to forestall certain objections in order to make a convention acceptable*

> *to a maximum number of States, it is always possible to include an article expressly approving specified reservations*[27]. (Italics ours.) If it is desired in special cases to permit signatories, and not only parties, to reject proposed reservations, the League of Nations formula mentioned above, used in the Convention for the Prevention and Punishment of Terrorism, might be applicable[28].'

(Footnote 27 refers to Article 39 (1) of the Revised General Act for the Pacific Settlement of International Disputes ; footnote 28 to Article 23 of the Convention on Terrorism.)

" Let us now see how the question of reservations was dealt with during the preparation of the Genocide Convention. The Secretary-General prepared a ' Draft Convention on the Crime of Genocide ' in pursuance of a resolution of the Economic and Social Council, and this document is dated 26th June, 1947. It consisted of draft articles followed by comments. The passage dealing with reservations is as follows :

> ' *Article XVII*
>
> (Reservations.) No proposition is put forward for the moment.
>
> *Comment.*
>
> At the present stage of the preparatory work, it is doubtful whether reservations ought to be permitted and whether an article relating to reservations ought to be included in the Convention.
>
> We shall restrict ourselves to the following remarks :
>
> (1) It would seem that reservations of a general scope have no place in a convention of this kind which does not deal with the private interests of a State, but with the preservation of an element of international order.
> For example, the convention will or will not protect this or that human group. It is unthinkable that in this respect the scope of the convention should vary according to the reservations possibly accompanying accession by certain States.
>
> (2) Perhaps in the course of discussion in the General Assembly it will be possible to allow certain limited reservations.
> These reservations might be of two kinds : either reservations which would be defined by the convention itself, and which all the States would have the option to express, or questions of detail which some States might wish to reserve and which the General Assembly might decide to allow.'

" It is evident from the final paragraph that what the Secretary-General had in mind was that it was open to the delegates either to define any permissible reservations in the Convention itself or to obtain for them the express permission of the General Assembly, that is to say that, in accordance with a not infrequent practice, the permitted reservations should be agreed in advance. Instances of this practice have already been given ; it was not adopted in this case.

" The Draft Convention was first referred to all the Member States for comment. The United States of America was the only one that commented on this part of the Draft, and its comment was limited to the statement : ' An article on the subject of " reservations " should be omitted '. The Draft was then referred to a body known as the ' *Ad Hoc* Committee on Genocide ', which appointed a sub-committee, consisting of the representatives of Poland, the Union of Soviet Socialist Republics, and the United States of America, to study it. This sub-committee ' saw no need for any reservations ' (Document E/AC/25/10, page 5) and this conclusion was unanimously adopted by the full *Ad Hoc* Committee on 27th April, 1948 (E/AC/25/SR/23, page 7). Accordingly, the Draft prepared, as revised by the *Ad Hoc* Committee, contained no provision concerning reservations. No proposal for a reservations article was made in the Sixth Committee or in the plenary meetings

Case No. 118 *Contd.*

of the General Assembly and, accordingly, the text of the Convention as now in force contains no provision on this subject.

" After the Sixth Committee had approved the final text of the Convention at its 132nd and 133rd meetings, on the 1st and 2nd December, 1948, the representatives of several governments reserved their position in regard to this or that article or in regard to the whole Convention, and a summary of this discussion will be found on pages 88 and 89 of the printed volume containing *inter alia* the ' Written Statement of the Secretary-General ' submitted to the Court. In the course of that discussion, the rapporteur, M. Spiropoulos, referring to this discussion, said :

> ' Those reservations could be made at the time of the signature of the Convention. However, if a government made reservations regarding a convention, it could not be considered as a party to that convention unless the other contracting parties accepted those reservations, expressly or tacitly.'

" The Chairman of the Sixth Committee, in closing the discussion on this point, said that ' the purport of those statements would be recorded in the summary record of the meeting in the usual way. [He] felt that there was no necessity to open a discussion on the legal implications of the reservations which had been made.'

" We do not find it possible to infer from the manner in which the question of reservations was dealt with throughout the preparatory work that there was any agreement to confer upon States desiring to sign, ratify or accede to this Convention any right to make reservations which would not be dealt with in accordance with the normal law and practice observed by the United Nations.

" To summarize our argument up to this point, we are of the opinion:

" (*a*) that the existing rule of international law, and the current practice of the United Nations, are to the effect that, without the consent of all the parties, a reservation proposed in relation to a multilateral convention cannot become effective and the reserving State cannot become a party thereto ;

" (*b*) that the States negotiating a convention are free to modify both the rule and the practice by making the necessary express provision in the convention and frequently do so ;

" (*c*) that the States negotiating the Genocide Convention did not do so ;

" (*d*) that therefore they contracted on the basis that the existing law and the current practice would apply in the usual way to any reservations that might be proposed.

" In these circumstances, can it be conceded that it was agreed by the negotiating governments, during the preparation of the Genocide Convention, that reservations would be permitted and accepted by the parties to the Convention in so far as they might be compatible with the object and purpose of the Convention ; and further that each of the existing parties to the Convention should appraise the admissibility of the reservation, individually and from its own standpoint, and determine its subsequent action, in the light of this criterion ?

" This attempt to classify reservations into ' compatible ' and ' incompatible ' would involve a corresponding classification of the provisions of the Convention into two categories—of minor and major importance ; when a particular provision formed part of ' the object and purpose of the Convention ', a reservation made against it would be regarded as ' incompatible ', and the reserving State would not be considered as a party to the Convention ; when a particular provision did not form part of ' the object and purpose ', any party which considered a reservation made against it to be ' compatible ' might regard the reserving State as a party. Any State desiring to become a party to the Convention would be at liberty to assert that a particular provision was not a part of ' the object and purpose ', that a reservation against it was ' compatible with the object and purpose of the Convention ', and that it had therefore a right to make that reservation—subject always to an objection by any of the existing parties on the ground that the reservation is not ' compatible '.

" We regret that, for the following reasons, we are unable to accept this doctrine :

" (*a*) It propounds a new rule for which we can find no legal basis. We can discover no trace of any authority in any decision of this Court or of the Permanent Court of International Justice or any other international tribunal, or in any text-book, in support of the existence of such a distinction between the provisions of a treaty for the purpose of making reservations, or of a power being conferred upon a State to make such a distinction and base a reservation upon it. Nor can we find any evidence, in the law and practice of the United Nations, of any such distinction or power.

" If, therefore, such a rule is to apply to the Genocide Convention, it would have to be deduced from the intentions of the parties. It must be remembered that the representatives of the governments which negotiated this Convention were in complete control of its machinery, of its procedural clauses, and were free to insert in the text any stipulations in the matter of reservations which seemed to them to be suitable. They refrained from doing so, although, as has been shown, the question of making provision for reservations was discussed at several stages during the negotiations. It is difficult to see how their intention that reservations should be governed by some new criterion of ' compatibility ' can be deduced from the fact that they decided against making the obvious and simple provision required to give effect to such intention. If they had intended to permit certain reservations, there was available a well recognized method of doing so, to which we have already referred, namely, for them to agree in advance upon, and specify in the text of the Convention, those reservations which their governments were prepared to accept. As we have seen, the Secretary-General, in the Draft of this Convention prepared by him and dated 26th June, 1947, drew attention to this procedure, so that it must have been present to the minds of the governments. But the governments responsible for this Convention adopted no such procedure and agreed upon the text on the basis of the existing law and practice, which require unanimous assent to all reservations.

" Can it be said, then, that the governments which negotiated and voted for this Convention through their delegates did so in the belief that any State when signing, ratifying or acceding to it would be at liberty to divide its provisions into those which do, and those which do not, form part of ' the object and purpose of the Convention ' and to make reservations against any of the latter, which would thereupon take effect without the consent of the other parties ? We can find no evidence of any such belief.

" On the contrary, such a rule is so new, and the test of the compatibility of a reservation with ' the object and purpose of the Convention ' is so difficult to apply, that it is inconceivable that the General Assembly could have passed the matter over in silence and assumed that all the contracting States were fully aware of the existence of such a test in international law and practice and were capable of applying it correctly and effectively. We feel bound therefore to conclude that the parties entered into this Convention on the basis of the existing law and practice, and in these circumstances we do not see how one can impute to them the intention to adopt a new and different rule.

" (*b*) Moreover, we have difficulty in seeing how the new rule can work. When a new rule is proposed for the solution of disputes, it should be easy to apply and calculated to produce final and consistent results. We do not think that the rule under examination satisfies either of these requirements.

" (i) It hinges on the expression ' if the reservation is compatible with the object and purpose of the Convention '. What is the ' object and purpose ' of the Genocide Convention ? To repress genocide ? Of course ; but is it more than that ? Does it comprise any or all of the enforcement articles of the Convention ? That is the heart of the matter. One has only to look at them to realize the importance of this question. As we showed at the beginning of our Opinion, these are the articles which are causing trouble.

" (ii) It is said that on the basis of the criterion of compatibility each party should make its own individual appraisal of a reservation and reach its own conclusion. Thus, a reserving State may or may not be a party to the Convention according to the different viewpoints of States which have already become parties. Under such a system, it is obvious that there will be no finality or certainty as to the status of the reserving State as a party as long as the admissibility of any reservation that has been objected to is left to subjective determination by individual States. It will only be objectively determined when the question of the compatibility of the reservation is referred to judicial decision ; but this procedure, for various reasons, may never be resorted to by the parties. If and when the question is judicially determined, the result will be, according as the reservation is judicially found to be compatible or incompatible, either that the objecting State or States must, for the first time, recognize the reserving State as being also a party to the Convention, or that the reserving State ceases to be a party in relation to those other parties which have accepted the reservation. Such a state of things can only cause the utmost confusion among the interested States. This lack of finality or certainty is especially to be deprecated in the case of the operation of the clauses relating to the coming into force of the Convention (Article XIII) and its termination by denunciations (Article XV). We may add that, as we understand the questions referred to the Court, what the General Assembly wishes to know is whether in given circumstances a reserving State can or cannot be regarded *by the law* as a party to the treaty—not whether, or when, an existing party, in the light of its individual appraisal, may consider a reserving State as a party or not.

" (iii) It is suggested that certain contracting States holding different opinions upon the compatibility of a reservation may decide to settle the dispute which thus arises by adopting the procedure laid down in Article IX of the Convention ; this article provides for the compulsory jurisdiction of the Court, but it should be noted that eight States have already made reservations against, or in relation to, this very article.

" (iv) With regard to objections which are not based on incompatibility, the suggestion is made that the reserving State and the objecting State should enter into discussion and that an understanding between them would have the effect that the Convention would enter into force between them, except for the clauses affected by the reservation. But we cannot regard the admissibility of a reservation as a private affair to be settled between pairs of States. Moreover, it is clear that different pairs of States may come to different understandings upon the same reservations and that some States may consider a reserving State to be a party while others do not.

" (v) When the question of reservations to this Convention first arose in the fifth session of the General Assembly, the conditions required for bringing the Convention into force did not yet exist. It was necessary to consider how Article XIII, which requires twenty ratifications or accessions to bring the Convention into force, was going to work in the event of some of the ratifications or accessions being accompanied by reservations. Suppose that one of the first twenty ratifications or accessions tendered to the Secretary-General had been accompanied by a reservation which one or more of the States previously ratifying or acceding were prepared to accept, while the other States previously ratifying or acceding were not prepared to accept it, what is the position according to the new rule ? In the view of some States the requirement of twenty ratifications or accessions would have been satisfied and the Convention would enter into force on the ninetieth day after the date of the last deposit. In the view of others, the requirement would not be satisfied. Would the Convention be in force ? And suppose later that it was judicially determined that the reservation referred to was not 'compatible with the object and purpose of the Convention', what would happen ? Would the Convention cease to be in force from that moment ? And would it be regarded *ab initio* as never having been in force ? Such problems are bound to arise when the question whether a State is or is not a party remains in doubt, and, as we have already indicated, the importance of that question is not confined to Article XIII. In addressing the Court on April 10th, 1951, the representative of the Secretary-General showed, by means of numerous examples, how essential it is to the discharge of his functions as depositary of this Convention and many other multilateral conventions that he should know definitely whether a State is or is not a party ; he told the Court that the Secretary-General is the depositary of more than sixty multilateral conventions which have been drafted or revised under the auspices of the United Nations.

" We regret, therefore, that we do not find in the new rule that has been proposed any reliable means of solving the problems to which reservations to this Convention have given and may continue to give rise, nor any means that are likely to produce final and consistent results.

" We believe that the integrity of the terms of the Convention is of greater importance than mere universality in its acceptance. While it is undoubtedly true that the representatives of the governments, in drafting and adopting the Genocide Convention, wished to see as many States become parties to it as possible, it was certainly not their intention to achieve universality at any price. There is no evidence to show that they desired to secure wide acceptance of the Convention even at the expense of the integrity or uniformity of its terms, irrespective of the wishes of those States which have accepted all the obligations under it.

" It is an undeniable fact that the tendency of all international activities in recent times has been towards the promotion of the common welfare of the international community with a corresponding restriction of the sovereign power of individual States. So, when a common effort is made to promote a great humanitarian object, as in the case of the Genocide Convention, every interested State naturally expects every other interested State not to seek any individual advantage or convenience, but to carry out the measures resolved upon by common accord. Hence, each party must be given the right to judge the acceptability of a reservation and to decide whether or not to exclude the reserving State from the Convention, and we are not aware of any case in which this right has been abused. It is therefore not universality at any price that forms the first consideration. It is rather the acceptance of common obligations—keeping step with like-minded States—in order to attain a high objective for all humanity, that is of paramount importance. Such being the case, the conclusion is irresistible that it is necessary to apply to the Genocide Convention with even greater exactitude than ever the existing rule which requires the consent of all parties to any reservation to a multilateral convention. In the interests of the international community, it would be better to lose as a party to the Convention a State which insists in face of objections on a modification of the terms of the Convention, than to permit it to become a

Case No. 118 *Contd.* party against the wish of a State or States which have irrevocably and unconditionally accepted all the obligations of the Convention.

" The Opinion of the Court seeks to limit the operation of the new rule to the Genocide Convention. We foresee difficulty in finding a criterion which will establish the uniqueness of this Convention and will differentiate it from the other humanitarian conventions which have been, or will be, negotiated under the auspices of the United Nations or its Specialized Agencies and adopted by them. But if the Genocide Convention is in any way unique, its uniqueness consists in the importance of regarding it as a whole and maintaining the integrity and indivisibility of its text, whereas it seems to us that the new rule propounded by the majority will encourage the making of reservations.

" In conclusion, the enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation ; but the Genocide Convention is an instrument which is intended to produce legal effects by creating legal obligations between the parties to it, and we have therefore felt it necessary to examine it against the background of law.

" On Question I our reply is in the negative.

" Accordingly, Question II does not arise for us.

" On Question III we dissent from the reply given by the majority."

Judge Alvarez in his Dissenting Opinion stated, *inter alia*, as follows :

" In appraising multilateral conventions—and specifically that on genocide—in the future, we shall be forced to abandon traditional criteria, because we are now confronted with an international situation very different from that which existed before the last social cataclysm ; the latter has caused a profound and rapid evolution of facts and ideas in the international sphere. . . .

" According to current opinion, this Court has to apply the principles of international law deemed to be in existence at the moment when it delivers its judgment or opinion, without considering whether they have undergone any more or less sudden changes, or whether they are in accord with the new conditions of international life ; it appertains—we are told—to the International Law Commission created by the United Nations to determine what modifications should be made in international law.

" That is a view which it is impossible to accept. As a result of the great changes in international life that have taken place since the last social cataclysm, it is necessary that the Court should determine the present state of law in each case which is brought before it and, when needed, act constructively in this respect, all the more so because in virtue of Resolution 171 of the General Assembly of the United Nations of 1947, it is at liberty to develop international law, and indeed to create law, if that is necessary, for it is impossible to define exactly where the development of this law ends and its creation begins. To proceed otherwise would be to fail to understand the nature of international law, which must always reflect the international life of which it is born, if it is not to be discredited.

" The method I have just indicated is that applied to domestic constitutional law. If, for example, consequently upon a revolution, a new republican political régime establishes itself in the place of a monarchy, it is obvious that both old and new institutions must at once be applied and interpreted in conformity with the new régime.

" There are stronger reasons why the same course should be followed in regard to international law. After the social cataclysm which we have just passed through, a *new order* has arisen and, with it, a *new international law*. We must therefore apply and interpret both old and new institutions in conformity with both this new order and this new law.

" In order not to go outside the scope of the Request for an Opinion, I will confine myself to indicating the characteristics of the new international law, so far as concerns multilateral conventions of a special character.

" In this respect, this law includes within its domain four categories of multilateral conventions, three of which were formerly unknown : (*a*) those which seek to develop world international organization or to establish regional organizations, such as the European organization which is of such great present-day interest ; (*b*) those which seek to determine the territorial status of certain States ; such conventions have existed in Europe since the beginning of the XIXth century, and have constituted what may be called ' European public law ' ; (*c*) conventions which seek to establish new and important principles of international law ; (*d*) conventions seeking to regulate matters of a social or humanitarian interest with a view to improving the position of individuals.

" It is among the conventions referred to under (*c*) and (*d*) above that we find the Convention on Genocide. The new international law, reflecting the new orientation of the legal conscience of the nations, condemns genocide—as it condemns war—as a crime against civilization, although this was not admitted till quite recently.

" Conventions of the above four categories present characteristics which differentiate them markedly from ordinary multilateral conventions.

" To begin with, they have a universal character ; they are, in a sense, the *Constitution* of international society, the *new international constitutional law*. They are not established for the benefit of private interests but for that of the general interest ; they impose obligations upon States without granting them rights, and in this respect are unlike ordinary multilateral conventions which confer rights as well as obligations upon their parties.

" Furthermore, these conventions are not merely formulated under the auspices of the United Nations, but in its Assemblies ; they are discussed there at length by all States, who have the opportunity to comment upon them as they see fit ; and the conventions which are proposed by these Assemblies can be modified by them up to the last moment.

" The decisions of these Assemblies are taken upon a majority vote (Art. 18 of the Charter). The old unanimity rule is thus abolished, or rather it exists only in the exceptional cases mentioned in the said Article 18. This rule of the majority vote is, moreover, in conformity with our ideas of international organization, of the interdependence of States and of the general interest ; national sovereignty has to bow before the will of the majority by which this general interest is represented.

" (Let us note, in passing, that the judgments and opinions of this Court are given on a majority vote.)

" Thus, in fact, these Assemblies of the United Nations are, in these cases, fulfilling a legislative function.

" It is convenient to recall that at times certain States have given the General Assembly of the United Nations truly legislative powers by submitting themselves in advance to its decisions upon questions which they have referred to it. We find a typical case in the peace treaty signed between Italy and the four Great Powers, in the part which relates to the future of the former Italian colonies. The General Assembly of 1949 determined their fate ; and its resolution concerning Eritrea contains the broad outline of a Constitution.

" In addition to the multilateral conventions which have just been

Case No. 118 Contd.

mentioned, the Assemblies of the United Nations pass Declarations and Resolutions of a very important nature. These Declarations do not require ratification, and, by reason of their nature, are not susceptible to reservations ; they have not yet acquired a binding character, but they may acquire it if they receive the support of public opinion, which in several cases has condemned an act contrary to a Declaration with more force than if it had been a mere breach of a convention of minor importance.

" Finally, the General Assembly of the United Nations is the meeting place where States discuss political matters of general interest (open diplomacy) ; in doing so, the Assembly is in a good position to reconcile Law and Politics.

" In short, the Assembly of the United Nations is tending to become an actual international legislative power. In order that it may actually become such a power, all that is needed is that governments and public opinion should give it support. Public opinion is an important factor which comes into play in the new international law.

" Certain consequences of great practical importance ensue from the nature of the four categories of multilateral conventions which have just been mentioned, and from the manner in which they were drawn up.

" To begin with, the said conventions are almost real international laws.

" Secondly, these conventions signed by a great majority of States ought to be binding upon the others, even though they have not expressly accepted them : such conventions establish a kind of binding custom, or rather principles which must be observed by all States by reason of their interdependence and of the existence of an international organization.

" It follows from the foregoing that the said conventions must not be interpreted with reference to the preparatory work which preceded them ; they are distinct from that work and have acquired a life of their own ; they can be compared to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard. These conventions must be interpreted without regard to the past, and only with regard to the future.

" Nor must they be interpreted in the light of arguments drawn from domestic contract law, as their nature is entirely different.

" Let us next consider the particular question of the reservations to which the conventions of which I have just spoken—and in particular that on genocide—may be subjected.

" These conventions, by reason of their nature and of the manner in which they have been formulated, constitute an indivisible whole. Therefore, they must not be made the subject of reservations, for that would be contrary to the purposes at which they are aimed, namely, the general interest and also the social interest.

" To support this view, one may refer to what has happened in the case of certain instruments of our international organization, in particular the Charter of the United Nations and the Statute of the International Court of Justice. After long discussions preceding their formulation, these instruments were accepted without reservation by all participating States ; and, at the present time, countries which desire to take part in the United Nations are prepared to sign this Charter and this Statute upon the same terms.

" These instruments, to be sure, have given occasion to many criticisms, and if the States had been allowed to make reservations in regard to them they would have done so ; nevertheless, they accepted them as they stood, because they could not do otherwise. A psychological factor, in fact, comes into consideration in regard to these instruments : States are unwilling to remain aloof from these conventions, for, if they did so, they would find themselves in an awkward position in international society.

" Those who advocate the admissibility of reservations even in the four categories of statements to which I have referred, argue that States desire to make reservations, and that if they were not allowed to, they would not sign these instruments.

" To this it can be replied that, when the said conventions were debated in the Assemblies of the United Nations, the States had an opportunity of making criticisms or objections on any points that they pleased, and that, consequently, they cannot afterwards return to those points. It would be inadmissible that an instrument approved by the Assembly of the United Nations and designed to form one of the foundations of our international life could be destroyed, or even shaken, by the independent action of one or more States, which actually took part in drawing up the conventions concerned.

" To avoid these difficulties, conventions of the kind referred to above ought to be established in their essential points without going into details, so that they can be accepted by the greatest possible number of States ; a less ambitious pact, upon which all parties are in agreement, is preferable to a more elaborate pact to which numerous reservations have been made.

" As regards the Convention on Genocide in particular, it is contended that it may be made the subject of reservations because this possibility was mentioned in the General Assembly of the United Nations ; and because certain States gave their adhesion to this Convention subject to reservations, and, finally, because the matter of reservations is mentioned in the Request for the opinion of the Court.

" To this it can be replied that if reservations to this Convention are contemplated, that is a consequence of the survival of old-fashioned ideas on multilateral conventions ; people are still considering this subject in relation to the old criterion, without taking its new aspect into consideration.

" It has been proposed to seek a solution of the problem stated in the Request by having recourse to doctrinal or practical systems. According to one point of view, reservations, to be valid, must be accepted by all the contracting States. Following another more recent system—that adopted by this Court—reservations are inadmissible if they are not compatible with the aims and objects of the Convention.

" Neither of these points of view is satisfactory. So far as the latter is concerned, States making reservations could argue that their reservations were not in conflict with the aim of the Convention, while States objecting to the reservations might allege the opposite. And, when one realizes that in this event it would be the duty of the International Court of Justice to settle the dispute, this tribunal will find itself so overburdened with controversies of this nature that its functions would be utterly distorted.

" The best solution would be to establish plainly that reservations are inadmissible in the four categories of multilateral conventions which have been mentioned, and in particular in that on genocide : the psychological factor which has been referred to would then come into play, and States would sign these conventions without reservations.

" If, however, the admissibility of reservations in these conventions is to be maintained, it would be necessary that the conventions should state this fact expressly, and explain the legal effect that they would possess. In that event the said conventions would become ordinary multilateral conventions ; and they would no longer be fundamental conventions of international law.

" If the scope of the reservations were not determined in the convention itself, it would have to be admitted that they would only involve the minimum legal result.

Case No. 118 *Contd.* " These results could then be as follows :

" If the reservations proposed by a State are not accepted by one or several others of the States parties to the convention, the reserving State is not to be considered as a party to the convention.

" If the reservations are accepted by the majority of other States, then the convention is transformed, and another convention takes its place ; the States which have not accepted the reservations are not parties to the new convention.

" Finally, if the reservations are accepted by certain States but objected to by others, then there is no convention at all.

" The foregoing considerations regarding the new international law concerning multilateral conventions of the kinds indicated above, and in particular the Convention on Genocide, provide a new criterion which we must employ in finding a solution to the questions put to the Court in the Request.

" To the first of these questions, I reply with a categorical NO : as I have just said, the Convention on Genocide cannot admit of reservations. In any event, even if they were allowed, they should produce the minimum of legal effect in favour of the States making the reservation.

" The second question does not fall to be considered, in view of the reply given to Question I.

" As regards Question III, I reply that legal effect must be given to objections made to reservations by a State coming within the categories stated in my paragraphs (*a*) and (*b*)."

IX.—Operation and Enforcement of Treaties. Necessity for Municipal Legislation

[See also Part I, INTERNATIONAL LAW IN GENERAL : IV, *Relation to Municipal Law* ; and Part VI, THE INDIVIDUAL IN INTERNATIONAL LAW : A, *In General*.]

Case No. 119 **Treaties—Operation and Enforcement of—Non-Ratification by Parliament—Franco-Italian Exchange of Letters—Aliens—Treatment of — Commercial Lease — Most - Favoured - Nation Clause.**

BENZONI *v.* DAVIDOVICI.

France, Tribunal de Bonneville. March 1, 1950.

THE FACTS.—The plaintiffs, Italian nationals, were tenants of business premises in France. They asked for, and were refused, the renewal of their lease. They accordingly sued to obtain the indemnity for eviction provided for in the Law of June 30, 1926, concerning commercial property. It was contended on behalf of the defendant that aliens were not entitled to the benefit of that Law. It was contended on behalf of the plaintiffs that the Exchange of Letters between France and Italy of June 17, 1946 (ratified by Decree of August 25, 1947), with respect to Italian immigration into France, granted to Italian nationals most-favoured-nation treatment in matters of establishment.

Held: that the plaintiffs were not entitled to the indemnity. The Court said: "The Exchange of Letters [between France and Italy] has not been ratified by the French Parliament. Moreover, it applies only to immigrants. The plaintiffs are not immigrants."

[Report: *Sirey*, 1951, II, p. 79.]

Treaties—Operation and Enforcement of—Relation to Municipal Law—Primacy of Treaties—French Constitution of 1946. **Case No. 120**

ESTATE OF REPETTI.

France, Tribunal Civil de la Seine. January 5, 1951.

THE FACTS.—This was an application by the heirs of Emma Repetti, a Swiss national who died domiciled in Paris, for the distribution of her immovable estate in France. A preliminary question for the consideration of the Court was whether it was competent in the matter. On the one hand, the rule was laid down in the French Civil Code that immovable property is subject to the *lex rei sitae*. On the other hand, Article 5 of the Franco-Swiss Treaty of 1869 provided that "any action concerning the distribution of an estate, by will or on intestacy, and the accounts to be rendered between heirs and legatees, shall be submitted . . . in the case of a French national who dies in Switzerland, to the court of his last domicile in France, and, in the case of a Swiss national who dies in France, to the court of his place of origin in Switzerland; Provided that in the distribution or sale of immovable property the law of the country where they are situate shall be applied."

Held: that the Court was incompetent. The Franco-Swiss Treaty established the principle of the unity of succession, and that Treaty must be applied even when it was in conflict with a rule of French public policy. The Court said:

"The Constitution of the French Republic provides that treaties are superior to municipal law. This is so even where the provisions of municipal law are rules of public policy. The Constitution is applicable to treaties concluded before its promulgation. Thus Articles 3, 14 or 822 of the Civil Code cannot be applied when they are in conflict with a treaty.

". . . . The provision of Article 5 of the Franco-Swiss Treaty of 1869 is clear. Its application is dependent on the realisation of one condition only—the death of a French national in Switzerland or of a Swiss national in France. The Treaty applies to the estates of French nationals who were domiciled and died in Switzerland, and to Swiss nationals who were domiciled and died in France. The intention of the contracting States, as recognised by Swiss decisions, was to make it a rule to treat an estate movable and immovable as a single unit, in whatever country the *de cujus* died or was domiciled at the time of his death. French courts have distinguished between the movable estate, to which they applied Article 5 of the Treaty, and the immovable estate, to which they applied Article 3 of the French Civil Code, which is a rule of public policy. Since the promulgation of the Constitution, under which treaties must be applied even when they are in conflict with a rule of public policy of municipal law, that distinction, which does not exist in the Treaty, cannot be maintained. . . ."

[Report: *Revue critique de Droit international privé*, 40 (1951), p. 315.]

Note.—Under the French Constitution, the superiority of treaties to municipal law extends to ousting the jurisdiction of French courts in favour of a Conciliation Commission set up by a treaty. So held in *Compagnie des Wagons-Réservoirs* v. *Ministry of Industry and Commerce and Italian Railways*, decided by the Tribunal Civil de la Seine on October 7, 1950. In February 1941, under a contract with the Italian State Railways, the plaintiff Company had to hand over to the latter five of its tank wagons, of which three had not yet been returned. The Court decided that it was not competent to hear the case, which came within Article 75 of the Treaty of Peace with Italy of 1947. Under that Article, Italy had to restore " all identifiable property at present in Italy which was removed by force or duress by any of the Axis Powers from the territory of any of the United Nations, irrespective of any subsequent transactions by which the present holder of any such property has secured possession ". Paragraph 6 of the Article provided that " Claims for the restitution of property shall be presented to the Italian Government by the Government of the country from whose territory the property was removed. . . ." Under Article 83 of the Treaty, all disputes which might arise in giving effect to Article 75 were to be referred to an International Conciliation Commission, whose decisions were to be definitive and binding on the parties. The Court said: " The Treaty of Peace with Italy is binding on the French courts, with a force which is even greater than that of municipal law, seeing that, under the Constitution, where a treaty conflicts with a law made either prior or subsequent thereto, it is the treaty which must prevail. This Treaty determines the conditions of the restitution of property removed from France by force or duress by the Italian Government. It is these conditions which the courts must apply to a demand for the restitution of such property—to the exclusion of the provisions of municipal law, even if the demand goes beyond the common law. It follows from that that the French courts cannot deal with actions for the restitution of property removed by Italy, by force or duress, from French territory. Every dispute of that kind must be submitted to the Conciliation Commission, which can give a definite ruling. French courts must declare themselves incompetent in this regard. . . . The present dispute can be settled neither according to French municipal law nor by French courts. It comes within Article 75 of the Treaty of Peace with

Italy and must be decided by the Conciliation Commission. That Commission decided on May 20, 1950,[1] that it was competent and . . . [ordered restitution of the wagons]." (Noted in *Recueil des décisions*, Part III, p. 185.)

Treaties—Enforcement of—Exchange of Letters—Absence of Ratification by Legislature—International Law—Relation to Municipal Law — Extradition — Conditions of — Extraditable Offences. **Case No. 121**

In re DAEM.

France, Court of Appeal of Montpellier. January 18, 1951.

THE FACTS.—This was a request by Belgium for the extradition of one Daem, a Belgian national, who was charged with having carried arms against Belgium and her allies. The offence in question was not covered by the Franco-Belgian Extradition Treaty of 1874, but an Exchange of Letters of December 17, 1946, and January 10, 1947, between the Belgian and French Governments provided for the extradition of persons charged with that offence. It was contended on behalf of the accused that that Exchange of Letters had never been approved by the French legislature, and could therefore not be applied by the French courts.

Held: that extradition must be granted. The Court said:

" Not all international agreements are subject as a matter of legal obligation to the solemn formality of ratification by the legislature. That is necessary only in the case of treaties in conflict with internal French laws (Article 26 of the Constitution of 1946) or relating to the matters set forth in Article 27. Article 27 reproduces the text of Article 8 of the Constitutional Law of July 16, 1875, and must, like that Article, be interpreted to mean that extradition treaties are not subject to ratification. Accordingly, the Letters exchanged between the French and Belgian Governments on December 17, 1946, and January 10, 1947, validly modified the Franco-Belgian Extradition Treaty of August 15, 1874, even though they were not ratified.

" The Belgian Government is therefore entitled to request, in reliance on that Exchange of Letters, the extradition of a Belgian national charged with carrying arms against Belgium or her Allies. Under Article 84, para. 4, of the French Penal Code that offence must be regarded as a common offence."

[Report: *Dalloz hebdomadaire*, 1951, *Sommaires*, p. 70.]

---

[1] See the *Wagons-Citernes Claim* (*Recueil des décisions*, Part II, p. 55).

Case No. 122 **Treaties—Operation of—Conflict between Treaty and Statute—Treaty of Economic Union between Belgium and Luxemburg, 1921—Rights of Belgian Nationals in Luxemburg under the Treaty—Whether Rights Conditional on Statutory Requirements of Law of Luxemburg.**

PUBLIC PROSECUTOR *v.* BRASSEUR.

Luxemburg, High Court of Justice. July 21, 1951.

THE FACTS.—The Treaty of Economic Union between Belgium and Luxemburg of July 25, 1921, provided—as far as here material—that permits to engage in trade in Belgium were to be valid in Luxemburg (and vice versa) and that traders and their agents domiciled in one country were to be entitled to canvass for and take orders in the other. A Luxemburg Decree of August 14, 1934, provided quite generally that all foreign nationals (which would include Belgian nationals) wishing to engage in trade in Luxemburg could do so only if issued with a permit by the Luxemburg authorities. The respondent, a Belgian national, was a commercial traveller who had canvassed for and taken orders in Luxemburg. He was charged with the offence of trading in Luxemburg without having first obtained a permit from the Luxemburg authorities, as provided in the Decree of 1934. The Court of first instance acquitted him on the ground that the requirement contained in the Decree of 1934 did not apply to Belgian nationals, the latter being entitled to special privileges under the Treaty of 1921, which took precedence of municipal law.[1] The prosecution appealed.

Held: that the acquittal must be confirmed as the Treaty of 1921 took precedence over the Luxemburg Decree of 1934, and as under the former the respondent did not require a Luxemburg permit. If—as was the case here—Belgian law does not require Belgian commercial travellers to hold individual permits in order to engage in trade in Belgium, such persons do not require permits of any kind in order to exercise the trade of commercial travellers in Luxemburg. The Court said:

"In interpreting the Decree of August 14, 1934, we must take into consideration the Treaty of Economic Union between the Grand-Duchy of Luxemburg and Belgium, of July 25, 1921, which was ratified by the Law of March 5, 1922. This Treaty contains two separate provisions in Article 3 which may be applicable to a Belgian national domiciled in Belgium and exercising the occupation of a commercial traveller in the territory of the Grand-Duchy. We must now determine the scope of each of these provisions. Paragraph 3 (of Article 3) provides that permits to engage in trade in Belgium shall be valid in the Grand-Duchy of Luxemburg and vice versa, while paragraph 5 provides that merchants and their agents domiciled in one of the two countries may take orders in the other provided that [they satisfy the relevant requirements provided by the law of the country in which they are established]. Paragraph 5, which defines the scope of paragraph 3, does not mention the requirement of an individual permit. It is such as to guarantee to Belgian commercial travellers who come to Luxemburg to canvass orders complete freedom of action, limited only in the matter of hawking and tax liability. In any event, the wording of the Treaty is such as to allow Belgian nationals in possession of a permit to engage in trade in Belgium to come temporarily to the Grand-Duchy there to canvass orders, without having to comply with the regulations of Luxemburg governing trading permits. It follows that the Decree of August 14, 1934, is in conflict with the Treaty of Economic Union in that it requires all merchants . . . who come temporarily to the Grand-Duchy in order there to engage in trade . . . to be in possession of a permit, without excepting from that requirement Belgian nationals, and without providing a special régime for the latter if they are in possession of a permit issued in Belgium. In view of the fact that where there is a conflict between the provisions of a treaty and those of a municipal enactment, the former must take precedence over the latter, the provisions of the Decree of August 14, 1934, are deemed to provide an exception for Belgian nationals, at least for those of them who have a trading permit issued in Belgium. The prosecution has failed to prove that the trading regulations which are in force in Belgium require the issue of individual permits. On the other hand, it may be inferred from the arrangement of the Treaty of Economic Union that in Article 3, paragraph 3, which provides that permits to engage in trade in one country are valid in the other, the term ' permit to engage in trade ' must include, apart from cases in which permits have to be granted individually, cases which, by virtue of the legal régime applicable to the person concerned, are exempt from the requirement of a permit. It follows that the accused, who is a Belgian national domiciled in Belgium and who has come temporarily to the Grand-Duchy in order there to canvass orders, is not required to obtain a permit from the Luxemburg authorities. Accordingly, he cannot have contravened the provisions of the Decree of August 14, 1934, and he must be acquitted."

---

[1] The respondent had been charged with the above offence not only as constituting a violation of the Decree of 1934, but also as constituting a violation of the Belgo-Luxemburg Protocol of May 23, 1935, which required Belgian commercial travellers to be in possession of a Belgian permit bearing the stamp of the Luxemburg consular officer. As this Protocol, however, had not been published, it was held not to be binding. Both the Court of first instance and the High Court of Justice therefore held that no person could be convicted under the provisions of this Protocol.

[Report : *Pasicrisie luxembourgeoise*, vol. XV, p. 235.]

Case No. 123 **Treaties—Operation and Enforcement of—Necessity for Municipal Legislation—The Law of Israel.**

ASSOCIATION FOR THE PROTECTION OF PALESTINE GOVERNMENT BONDHOLDERS *v.* MINISTER OF FINANCE OF ISRAEL.

Israel, Supreme Court sitting as the High Court of Justice. August 4, 1950.

By an Agreement of March 30, 1950, between the Governments of Israel and the United Kingdom (*U.N.T.S.*, vol. 86, p. 231) disposing of financial matters outstanding upon the termination of the Mandate, provision was made, *inter alia*, for the future redemption of a series of bearer bonds previously issued by the Government of Palestine. Upon an application for an order calling upon the respondent to advance the date for the resumption of the payment of dividends and of the redemption, both of which had been interrupted on the termination of the Mandate, it was *held* that in the absence of domestic legislation no ground existed for the intervention of the Court. " Counsel for the applicant has not succeeded in showing us any legal authority for our intervention in this case, since the Agreement between the Governments of Israel and the United Kingdom has not yet become part of the law of Israel so that a citizen can base upon it a claim against the Government."

[Report : *Pesakim Elyonim*, 10 (1950) p. 170.]

NOTE.—The matter was subsequently regulated by the Palestine Government Bearer Bonds Law, 5711–1951, passed on February 26, 1951 : see *Laws of the State of Israel*, authorized translation from the Hebrew, vol. 5 (5711–1950), p. 50.

Treaties—Operation of—Absence of Express Incorporation into Municipal Law—Applicability of Geneva Conventions on Treatment of Prisoners of War—The Law of Luxemburg.

See Case No. 6 (*H. and Others* v. *Public Prosecutor*).

Treaties—Operation of—Relation to Subsequent Municipal Law.

See Case No. 135 (*Jones-Dujardin* v. *Tournant and Haussy*).

Treaties—Operation of—Text in the Language of the Country Concerned.

See Case No. 132 (*Chammas* v. *Ministry of the Interior*).

Treaties—Operation of—Effect of Annexation—Incorporation of Austria into German Reich—Membership of Austria in Berne Copyright Union.

See Case No. 19 (*Infringement of Copyright (Austria) Case*).

Treaties—Operation of—Whether Part of Municipal Law—Agreement providing for Compensation for Damage Caused by Occupying Power—Claims by Individuals for Payment of Compensation—Competence of Municipal Courts—The Law of Austria.

See Case No. 3 (*Irresberger and Another* v. *Republic of Austria*).

Treaties—Operation of—Under Municipal Law—Right of Individuals to Invoke Treaties in Municipal Courts—The Law of Egypt.

See Case No. 132 (*Chammas* v. *Ministry of the Interior*).

Treaties — Conflict with Municipal Law — Municipal Law Enacted after Treaty—Whether Provisions of Treaty or Municipal Law Apply—The Law of Luxemburg.

See Case No. 5 (*Dieudonné* v. *Administration des Contributions*).

XII.—Interpretation of Treaties

i.—Agencies of Interpretation

Treaties—Interpretation of—Agencies of Interpretation—The Law of France. **Case No. 124**

In re SOCIÉTÉ MATHIEU.

France, Conseil d'État. July 28, 1951.

THE FACTS.—Some premises belonging to the Société Mathieu had on January 3, 1945, been requisitioned for the use of American forces stationed in France. Before deciding the amount of compensation to which the Company was entitled, the Court of Appeal of Aix-en-Provence, by decision of January 24, 1949, referred to the Conseil d'État the question whether the requisition in question fell within those which could be taken under the Law of July 11, 1938, concerning the organization of the nation for time of war, *i.e.* whether it was required to meet a public need.

Case No. 124 *Contd.*

Held: that the Conseil d'État was incompetent to appreciate the necessity of the requisition, since it was based not on the French Law but on an international agreement. The Court said:

"The legal basis of the requisition was not the Law of July 11, 1938 . . . which authorises the requisition of the use of premises where this is necessary for public requirements, but the Agreement between the Inter-Allied Supreme Command and the French Government for the application of Memorandum No. 1 of August 25, 1944, concerning assistance to Allied Forces in France, which provides that the French authorities will requisition supplies and services which the Inter-Allied Commander-in-Chief considers necessary for the military requirements of his command. In these circumstances the question referred to the Conseil d'État concerns the application of that Convention and not of the Law of July 11, 1938. The Convention concluded between the Inter-Allied Supreme Command and the French Government is an international act. The Conseil d'État is accordingly incompetent to answer the question."

[Report: *Revue critique de Droit international privé*, 42 (1953), p. 104.]

NOTE.—For another decision of the Conseil d'État to the effect that it was not competent to interpret international agreements and that such an interpretation must be given by the Minister for Foreign Affairs, see *Société Commentry, Fourchambault et Decazeville*, decided on February 28, 1951 (*Revue critique de Droit international privé*, 42 (1953), p. 109).

Case No. 125

Treaties—Interpretation of—Agencies of Interpretation—Nationality—Effects of Change of Sovereignty—Treaty of Versailles, 1919—Reintegration of Inhabitants of Alsace-Lorraine.

In re WOLF.

France, Cour de Cassation. April 6, 1951.

THE FACTS.—This was a petition for the grant of French nationality based on the Annex to Section V, Part III, of the Treaty of Versailles. Paragraph 1, clause 1, of that Annex provided for the reintegration into French nationality of persons who had lost that nationality as a result of the Treaty of Frankfurt of 1871, and had not since acquired a nationality other than German nationality. Clause 2 extended the same right to the descendants of persons covered by clause 1. The petitioner was the legitimate descendant of maternal grandparents who had lost French nationality as a result of the Treaty of Frankfurt, and had not acquired any nationality other than German. She herself was a Luxemburg national. On June 19, 1947, the Tribunal Civil of Metz held that she satisfied the conditions for reintegration into French nationality. In support of that view the Court pointed out that the Treaty of Versailles did not expressly state that the descendants of persons who had lost French nationality as a result of the Treaty of Frankfurt were also required not to have acquired any nationality other than German nationality, and held that, since treaties must be strictly interpreted, no such requirement could be read into the relevant provision. This was an appeal " in the interest of the law " against that decision.

Held: that the decision of the lower Court must be quashed. The descendants of persons who had lost French nationality as a result of the Treaty of Frankfurt were also required not to have acquired a nationality other than German nationality in order to be entitled to reintegration into French nationality. The Court said :

" By letter of June 16, 1950, addressed to the Minister of Justice, the Minister for Foreign Affairs expresses the view that ' it was undoubtedly the intention of the authors of the Treaty of Versailles to extend the condition set forth in clause 1 of Paragraph 1 of the Annex to clause 2 ', since a cession of territory resulting from a treaty of peace does not automatically have any influence, according to the principles of international law, on the nationality of subjects of a third State.

" When the interpretation of a treaty raises a question of public international law, as in the present case, the courts must follow the official interpretation given by the French Government."

[Report : *Sirey, Jurisprudence,* 1952, I, p. 84.]

Treaties — Interpretation of — Agencies of Interpretation — Ministry of Foreign Affairs—Interpretation of Clear Text. **Case No. 126**

Société Schweppes *v.*
Administration d'Enregistrement.

France, Tribunal Civil de Pontoise. October 17, 1951.

The Facts.—This was an action to determine whether the plaintiff Company, of British nationality, was liable in France to the payment of the " *impôt de solidarité nationale* ", established by Ordinance of August 15, 1945. The Franco-British Convention of February 28, 1882, provided that the nationals of the Contracting Parties should be exempt, on the territory of the other party, from all war contributions and extraordinary loans or contributions raised to meet a situation of emergency. By a letter of September 19, 1946, addressed to the British

Case No. 126 *Contd.*

Embassy in Paris, the French Ministry of Foreign Affairs stated that the "*impôt de solidarité nationale*" could not be regarded as a war contribution or extraordinary loan or contribution in the meaning of that treaty provision. The reason given for that interpretation was that the tax in question was not established exclusively for French nationals but was, like death duties, levied on all property actually or legally situate in France, whatever the nationality of its owners. The British Government, while making reservations as to the validity of that interpretation, stated that it would not contest it. It was now contended on behalf of the plaintiff Company that the "*impôt de solidarité nationale*" was an extraordinary contribution in the meaning of the Convention of 1882. It was further contended that the text of that Convention was clear and that there was accordingly no room for an interpretation of its provisions by the Minister for Foreign Affairs.

Held: that the plaintiff Company was not exempt from payment of the "*impôt de solidarité nationale*". The Court was bound by the interpretation given by the French Government. The Court said:

"When the interpretation of a diplomatic treaty raises questions of public policy, the courts are bound by the official interpretation given by the French Government. Since taxation is a matter of public interest, the court is bound by the interpretation of the Franco-British Convention of February 28, 1882, given by the French Foreign Minister.

"The plaintiff Company contends that the text of the Convention is clear and does not require interpretation; that the only question is that of characterising a French tax for the purpose of determining whether it falls within the scope of the Treaty; and that this is the function of the Judiciary. However, it is arguable whether the *impôt de solidarité nationale*, although described as exceptional in the Ordinance of August 15, 1945, which instituted it, is an extraordinary contribution in the meaning of the Convention of 1882. It may be maintained, as does the Minister of Foreign Affairs in his Note to the British Ambassador, that the contributions to which that Convention refers are those which are exclusively based on the nationality of those liable to pay it, while the tax in question is levied on all property actually or legally situate in France, whatever the nationality of its owners. Moreover, if it were clear that the tax was covered by the provisions of the Convention, the British Government would not have failed to claim exemption for its nationals. . . . It thus appears that the meaning and scope of the Treaty are not clear, and that there was a question of interpretation for the Government."

[Report: *Revue critique de Droit international privé*, 41 (1952), p. 288.]

Treaties—Interpretation of—Agencies of Interpretation.

See Case No. 133 (*Ministère Public* v. *Oliger*).

ii.—Principles and Rules of Interpretation

Treaties—Interpretation of—Various Rules of—Provisions Interpreted by Reference to Context of Adjacent Provisions—Interpretation by Deduction *a contrario*—Peace Treaty of Paris, 1947—Invalidation of Contracts—Tenancy Agreements made by Agent of United Nations National—Whether " encumbrances or charges ". **Case No. 127**

GUILLEMOT-JACQUEMIN CLAIM.

Franco-Italian Conciliation Commission.

(Bolla, Perier de Feral, Sorrentino.) *August* 29, 1949.

THE FACTS.—This was a claim by Madame Guillemot-Jacquemin, a French national, for the restoration to her of two apartments in Rome which had been sequestrated in 1943. On June 10, 1940, when Italy declared war on France, the claimant, who was then in France, appointed one de Campos to act as her agent to manage the properties. De Campos let the apartments on her behalf and, later, renewed the tenancies. The sequestration was lifted on March 26, 1946, but the tenants of the apartments, Italian nationals, remained in possession. On May 16, 1946, the claimant sued one of the tenants in the Court of Rome, under certain legislation enacted before the signature of the Peace Treaty, for possession of the apartment occupied by the latter, but the action was dismissed.

Before the Commission, it was contended on behalf of the claimant that, *inter alia*, the transactions between de Campos, acting as the agent of a French national and Italian nationals, were invalidated by Annex XVI, Part A, paras. 1 and 3, of the Peace Treaty of Paris, 1947.[1] On behalf of the Italian Govern-

---

[1] Part A of Annex XVI provides :

" (1) Any contract which required for its execution intercourse between any of the parties thereto having become enemies as defined in part D of this Annex, shall, subject to the exceptions set out in paragraphs 2 and 3 below, be deemed to have been dissolved as from the time when any of the parties thereto became enemies. Such dissolution, however, is without prejudice to the provisions of Article 81 of the present Treaty, nor shall it relieve any party to the contract from the obligation to repay amounts received as advances or as payments on account and in respect of which such party has not rendered performance in return.

" (3) Nothing in Part A of this Annex shall be deemed to invalidate transactions lawfully carried out in accordance with a contract between enemies if they have been carried out with the authorization of the Government of one of the Allied and Associated Powers."

Case No. 127 *Contd.*

ment, it was contended that Annex XVI of the Peace Treaty did not apply, because the contracts of tenancy were freely concluded after the entry into the war of Italy by the agent of the French claimant in her name and for her benefit. Tenancy agreements, moreover, can be executed without any " intercourse between the parties ". In reply, the claimant cited paragraph 3 of Part A, and deduced therefrom, *a contrario*, that it was the intention of the Peace Treaty to invalidate all contracts entered into, without the authorization of an Allied or Associated Government, between enemies as defined in paragraph (1) of Part D of the Annex.[1]

For the claimant, reliance was also placed on the judgment of the Court of Rome.

Held: (i) that the claim must fail. The tenancy agreements entered into in the name of Madame Guillemot-Jacquemin with the various tenants were not invalidated by the Treaty of Peace.

(ii) That the jurisdiction of the Commission was not ousted by the existence of the judgment of the Court of Rome. The Commission said :

" In order to interpret paragraph 3 of Part A of Annex XVI reasonably, it must be looked at in the context of the other provisions of the same Part. Paragraph 1 begins by formulating the principle that ' Any contract which required for its execution intercourse between any of the parties thereto having become enemies as defined in part D of this Annex, shall, subject to the exceptions set out in paragraphs 2 and 3 below, be deemed to have been dissolved as from the time when any of the parties thereto became enemies'. That is the principle of the dissolution of contracts entered into before the war by persons who became enemies, in so far as the execution of the contracts required intercourse between the parties. The first exception to the principle is that contained in paragraph 2 : ' such parts of any contract as are severable and did not require intercourse between any of the parties thereto having become enemies as defined in part D of this Annex '. Such parts of a contract are not dissolved. The second exception to the principle is that contained in paragraph 3 : ' transactions lawfully carried out . . . between enemies . . . with the authorization of the Government of one of the Allied and Associated powers '. Such transactions are excepted from invalidation even if they relate to a contract which must be regarded as invalidated by virtue of one of the provisions of Part A of Annex XVI.

---

[1] Annex XVI (D) provides :

" 1. For the purposes of this Annex, natural or juridical persons shall be regarded as enemies from the date when trading between them shall have become unlawful under laws, orders or regulations to which such persons or the contracts were subject.

" 2. Having regard to the legal system of the United States of America, the provisions of this Annex shall not apply as between the United States of America and Italy."

" Although paragraph 1 of Part A is made subject to the exceptions set out in paragraphs 2 and 3, those paragraphs could include, besides exceptions to paragraph 1, other principles such as the invalidation of contracts entered into during the war between enemy subjects. But if the draftsmen of the Treaty had wished to establish a new principle of so wide a scope (and one must have in mind the long time which elapsed between the end of hostilities between France and Italy and the signing of the Treaty of Peace) they would, in all probability, have announced the principle at the beginning of Part A; they would not merely have allowed it to be deduced *a contrario* from the formula adopted to create an exception from the principle of the dissolution of certain contracts entered into before the war. Moreover, the draftsmen of the Treaty chose to cast paragraph 3 of Part A in a form which shows clearly that the sole object of the provision is to set a limit to the operation of the other paragraphs (' Nothing in Part A of this Annex shall be deemed to invalidate . . .').

" Besides this, the text of paragraph 3 does not speak of the dissolution of a contract, as does paragraph 1, nor of parts of a contract, as does paragraph 2; it speaks of the invalidation of transactions lawfully carried out in accordance with a contract and executed under certain conditions. Paragraph 3 does not aim at operations which amount to the execution of an existing contract. The hypothesis which it envisages is that of a contract entered into between persons who were not enemies within the meaning of Part D, but who have since become enemies. Such a contract, so far as it requires for its execution intercourse between the parties, is dissolved; nevertheless ' transactions lawfully carried out in accordance with ' that contract are not affected by the dissolution, whether they were carried out before or during the war, provided that they were authorized by the Government of one of the Allied and Associated Powers; that applies as much to the execution of the contract *stricto sensu* as to arrangments made, if such should be the case, for the execution of the contract (for example, sale of goods with delivery by instalments). The execution of a contract, with all that it implies, must remain unquestioned, even if the contract has to be regarded as dissolved by the terms of the Treaty, provided that the execution was authorized by the Government of one of the Allied and Associated Powers.

" The only conclusion *a contrario* which can be drawn from paragraph 3 of Part A is that ' transactions lawfully carried out in accordance with a contract between enemies '—*i.e.*, a contract made before the war—are invalidated if they have not been carried out with the authorization of the Government of

Case No. 127 *Contd.* one of the Allied and Associated Powers. This conclusion results from the application of the principle set out in paragraph 1.

"It must be conceded that paragraph 3 would have read with greater precision if it had spoken of 'transactions lawfully carried out in accordance with a contract between persons who have become enemies within the meaning of Part D of this Annex'. But the draftsmen probably wished to simplify the text by adopting a more compact formula; it is possible that they had in view only the execution during the war of pre-war contracts and placed themselves at that moment, namely, a moment at which the parties were clearly enemies."

[Report: *Recueil des Décisions*, Part 1, pp. 45 and 105.]

NOTE.—The Commission also interpreted in similar fashion paragraphs 1 and 2 of Article 78 of the Peace Treaty and *held* that the tenancies were not "encumbrances or charges" within the meaning of paragraph 1.

Case No. 128 **Treaties—Interpretation of—Rules of—"Canons of Good Faith"—Comparison of English and French Texts—Parliamentary Debates—*Travaux préparatoires*—Peace Treaty of Paris, 1947—Whether Italian Special Capital Levy Duties Constitute "exceptional taxes for meeting charges arising out of the war".**

Re ITALIAN SPECIAL CAPITAL LEVY DUTIES.[1]

Franco-Italian Conciliation Commission.

(Bolla, Sorrentino, Perier de Feral.)

August 29, 1949.

THE FACTS.—The French Government applied for a declaration that certain special capital levy duties imposed by Italian legislation of 1947 did not apply to French nationals, the latter being United Nations nationals as defined by Article 78 (9)(*a*)[2] of the Peace Treaty. The Italian Government in reply contended that neither Article 78 (6)[3] nor any other restrictive

---

[1] A convenient English rendering of the French "*impôts extraordinaires sur le patrimoine*" and Italian "*imposta straordinaria sul patrimonio*".

[2] Article 78 (9) (*a*) provides:

"'United Nations nationals' means individuals who are nationals of any of the United Nations, or corporations or associations organised under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.

"The term 'United Nations nationals' also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy; . . ."

[3] Article 78 (6) reads as follows:

"United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in or executory provision of the Treaty applied to these estate duties.

Held: (1) that the special duties imposed by Italian Decrees No. 143 and 828 of 1947 and as codified by Decree No. 1431 of 1947 did not apply to French nationals ; and (2) that moneys collected for these duties from French nationals must be repaid within six months.

The Commission said : " The first point left for decision is whether the special progressive duty on the capital of juridical persons was or was not established within the period between September 3, 1943, and September 14, 1947, specified by Article 78 (6) of the Peace Treaty ".

On behalf of Italy, it was contended that under Article 1 of the Italian Civil Code laws come into force 15 days after their publication in the *Official Gazette*. The Decree of September 1, 1947 (No. 828 of 1947), was so published on September 4, 1947, and therefore came into force on September 19, 1947, that is, four days after the end of the period specified in Article 78 (6).

" The majority of the Conciliation Commission (the minority consisting of the Representative of the Italian Government) cannot accept this argument.

" Decree No. 828 was sanctioned and promulgated by the Provisional Head of State on September 1, 1947, and the act of promulgation rendered the law formally perfect. The purpose of the publication on September 4, 1947, was to bring the Law officially to the notice of all. The Law came into force after the normal *vacatio legis* of 15 days, but for the present purpose the decisive date is not that on which the Law became binding on all to whom it applied, and on which arose the duty of the taxpayer towards the State. This is not a matter of the internal public law relationship between taxpayer and State ; it is a matter of a public international law relationship between the Italian State and the French State, a relationship which is defined by the Peace Treaty.

" The decisive factor in this regard is that the Law subsists during the *vacatio* (see Amelio, *Commentary on the Italian Civil Code*, vol. 1, p. 6). By reason of its character as a contractual instrument, the Treaty must be interpreted according to the canons of good faith. This requirement prevents a tax of the kind mentioned in Article 78 (6) escaping from the exemption provided by that Article, even though the Law which imposed the tax was formally perfected before September 15, 1947, merely because by that date the period of 15 days fixed for publication had not yet expired. That period is provided

Italy by the Italian Government or any Italian authority between September 3, 1943, and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded."

Case No. 128 *Contd.* solely to satisfy the presumption that everyone knows the law. The Italian Government contends that Article 78 (6) does not impose an obligation on it ; the paragraph establishes objectively the exemption, for certain specified property, and, in consequence, in order to establish the temporal limits of the exemption it is necessary to refer to the relationship between the State and the taxpayer within the Italian internal juridical framework. That argument cannot be accepted. The obligation of exemption has an international character and must be defined in the very terms of the Treaty which created it.

" The second point left for decision concerns the identity of purpose of the two taxes which are the subject of this dispute with at least one of the purposes envisaged by Article 78 (6) of the Treaty of Paris.

" I.—By virtue of Article 90 of the Treaty, the French, English and Russian texts are equally authentic. The French text of Article 78 (6) affects taxes, levies or imposts imposed ' en vue de couvrir les dépenses résultant de la guerre ou celles qui ont été entraînées par l'entretien des forces d'occupation ou par les réparations à payer à l'une des Nations Unies '. In the English text, the corresponding clause reads : ' for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations '. The Italian Government regards the adjective ' specific ' in the English text, which is not found in the French text, as being material. It draws therefrom, first, the deduction that the Treaty envisaged solely that form of tax known as ' de scopo ', that is, a tax whose destination to a certain purpose is determined in a particular manner in the Law by which it is created, and the revenue from which does not go in a general and undifferentiated form into the receipts of the State budget, but retains its identity and is allocated to definite purposes. The French and Italian Governments agree that it was not necessary, in order to decide that a tax was one to which the provisions of Article 78 (6) of the Peace Treaty applied, that the purpose for which it had been created should be set out in the governmental act [by which it was imposed]. This point must be regarded as definitively decided under Article 19 (3) of the rules of procedure of the Franco-Italian Conciliation Commission.[1]

" It was nevertheless maintained on behalf of the Italian Government that the use in the English text of the adjective ' specific ' implies, if not that the purpose of a tax must be indicated in the act which creates it, at least that that purpose must in a special and not in a general way be one of those set out in Article 78 (6) of the Peace Treaty. According to the Italian Government that is not the case in regard to the two taxes in question. The war which Italy declared against the Allied and Associated Powers was financed by means of public loans and by inflation, and the two taxes in question were imposed as '*imposte-di-ponte*', until the end of the time required to assess the value of the new revenues in depreciated currency.

---

[1] Points on which agreement has been reached are regarded as definitively decided.

" The majority of the Conciliation Commission [the minority consisting of the Representative of the Italian Government] cannot accept this argument.

" As regards the divergence which appears to arise between the English and French texts of Article 78 (6) from the fact that in the former there is no adjective equivalent to 'specific', some light is thrown on the matter by the genesis of the Treaty of Peace. In the Draft Treaty of Peace with Italy (French text) as drawn up by the Council of Foreign Ministers, Article 78 (6) read as follows :

> 'Les ressortissants des Nations Unies ainsi que leurs biens seront exemptés de tous impôts, contributions ou taxes exceptionnels, auxquels le Gouvernement italien ou une Autorité italienne quelconque aurait soumis le capital de leurs avoirs en Italie entre la date de l'Armistice et celle de l'entrée en vigueur du présent Traité, spécialement en vue de couvrir les dépenses résultant de la guerre ou celles qui ont été entraînées par l'entretien des forces d'occupation ou par les réparations à payer à l'une des Nations Unies. . . .'[1]

The adjective 'specific' was translated '*spécialement*', but that adverb was so placed that there was a risk that it would erroneously mean that all special estate duties would be exempt, even those which were not instituted for the purpose of meeting the cost of the war, of the occupation or of reparations. It would appear that the error was notified and corrected, but although the attention of the French draftsmen must thus have been drawn to the adjective 'specific', they must have considered it as being something of a pleonasm. They therefore discarded the adverb '*spécialement*', it appearing to them that the condition of finality was sufficiently demonstrated by the words '*en vue de*'.

" Whatever may have been the genesis of the two texts, it is not in order to rely exclusively on one of them. An interpreter ought rather to strive to explain one by the use of the other. As the adjective 'specific' does not appear in the

---

[1] " United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts, imposed on their capital assets in Italy by the Italian Government or any Italian authority between the date of the Armistice and that of the coming into force of the present Treaty specifically for the purpose of meeting charges resulting out of the war or of meeting the costs of occupying forces or of reparations payable to any of the United Nations. . . ."

Case No. 128 *Contd.* French text, it can signify only one thing, that is to say, that the imposts, taxes and extraordinary capital levy duties, in order to come within the exemption, must have been created for the especial purpose of meeting the expenses of the war or the occupation or reparations, as opposed to the general purpose of meeting the ordinary requirements of the State or the special purpose of meeting the various exceptional requirements of those set out in Article 78 (6) of the Peace Treaty.

" II.—Were the two taxes in question introduced in Italy in order specially to meet charges arising out of war or the costs of occupation forces or reparation payable to any of the United Nations ?

" From the moment of her declaration of war on the Allied and Associated Powers, Italy saw her public expenditure increase to extraordinary proportions. The ordinary budget not being able to sustain such a severe shock, she had to have recourse, in order immediately to meet the extraordinary expenses—which could not be put off—arising out of the operations of the war and their immediate consequences, to loans, and in particular to the issue of Treasury Bonds and to inflation. It is not usual for States to have recourse to extraordinary taxes during war, because of the unfavourable repercussions which they can have on the population. But national debt tends to be converted by the force of circumstances into taxation and its service can be so great that it renders necessary, or advisable, an extraordinary tax at the moment when, the war being at an end, it is no longer necessary to avoid the chilling effect which new taxes are bound to have on the warlike ardour of a country. As regards inflation, it is equivalent to a tax imposed on those classes which are injured by monetary devaluation. But indebtedness in the form of paper money at a controlled rate also becomes converted by new requirements of the State which sees the real income of ordinary taxes diminish during the period of time required by a new census of taxable things. Even if one were to extract the enlarged figure of the arrears left in the Italian budget as the result of the waging of the war of 1940–1945, it is certain that the extraordinary requirements which the Italian Treasury had to meet in 1947 with means the consequent further inflation of which had, so far as possible, to be avoided, were a consequence of the war and its unfavourable outcome. In any event, war entails extremely high expenses not only during its course, but also in the period following it, in particular the period immediately following it, and that by reason of the cost of reconstruction, pensions to widows, orphans, the disabled, etc., etc. The definition of the special capital levy duty as given on June 9, 1947, by M. de Gasperi, President of the Council, to the Constituent Assembly therefore appears to be essentially correct : the capital levy duty constitutes a necessary contribution from the monied classes to the expenses of the war.

" On behalf of the Italian Government, it was contended that this declaration was merely political ; the words of M. Pella, Finance Minister, were quoted as to the finality of the special capital levy, first, during the sitting of the Constituent Assembly of July 1, 1947 (see the *Acts of the Constituent Assembly*, July 1, 1947, p. 5288) : ' this tax, the most important of the extraordinary financial measures, has to effect a triple purpose : to act as a " bridge " in the strictly fiscal domain for the period during which it is sought to establish in a definitive manner the extraordinary financial measures, to be an instrument of social justice in making the most well-to-do classes contribute to the work of reconstruction, and at the same time to exercise an anti-inflationist pressure '. Further, during the sitting of the Constituent Assembly of July 5, 1947 (*Acts of the Constituent Assembly*, July 5, 1947, p. 6458) : ' This tax must, of course, like every tax, have a principal object, that is to say, to furnish the State with additional revenue. Nevertheless, it is meant also to achieve an object of social justice in making the capital of everyone contribute to reconstruction on a steeply progressive scale. Another essential feature of the new tax is its anti-inflationist scope. In considering the various opinions according to which a tax ought to be paid solely out of income or, on the other hand, ought to be regarded as a true levy on capital . . . we think that the Government was right in giving priority to the task of creating a tax . . . in such a way as to contribute . . . to the anti-inflationist process which ought to find expression in a stabilisation of prices at a lower level. . . .' If the Italian authorities had to furnish a new form of revenue to the Treasury, it was precisely because the latter was exhausted as a result of the war and was quite incapable of facing the tasks of that reconstruction which the war itself had made necessary. If the Italian authorities decided on the special estate duty *una tantum*, it was because it is favourable to the less well-to-do classes and it is preferred by the taxpayers on whom it is imposed to a tax on income from employment . . . (*cf.* Einaudi, *Principi di scienza delle finanze*, 4th (revised) ed., pp. 342–344, Nos. 421–424). It is in that sense and no other that M. Pella alluded to the exigencies of social justice. It was an express reference to the declaration of M. de Gasperi that the capital levy was to be a method of imposing on the well-to-do classes the expenses of the war.

" It is clear that the expenses of the war will for a long time to come have more or less tangible repercussions on the taxes which will have to be paid by the Italian taxpayer, for it is evident that the capital levy is insufficient to cover those charges completely. But the further one goes from the moment when peace was restored, the more difficult it will be, by reason

Case No. 128 *Contd.*

of the continual incidence of new factors, to determine the causal relationship between the burden of the tax and the cost of the war of 1940–1945. The draftsmen of the Peace Treaty were fully aware of this when they proposed to exempt United Nations nationals and their property from those special capital levy duties only which were imposed during the period between September 3, 1943, and September 15, 1947, in order to meet charges arising out of the war and the occupation and the payment of reparations. The draftsmen of the Peace Treaty cannot have failed to realise that an exemption thus limited can only partially have protected United Nations nationals and their property from the fiscal consequences of the war in Italy, and that fact deprives of any force the argument put forward on behalf of the Italian Government and drawn from the disproportion between the volume of Italy's war expenditure and the revenue from the two exceptional taxes in question.

" What the draftsmen of the Peace Treaty intended was that Italy, having under the fascist régime undertaken a war of aggression (*cf.* the Preamble to the Treaty), nationals of the States which were the objects of that aggression and their property should not be made, immediately after the war, to pay special capital levy duties rendered necessary by that very policy. The draftsmen of the Treaty cannot fail to have had in mind precisely the special capital levy duty imposed by Law No. 828 of September 1, 1947. Decree Law No. 143 of March 29, 1947, represents, in effect, ' the epilogue of more than two years of studies carried out at the Ministry ' (declaration of M. Pella, the Finance Minister, at the sitting of the Constituent Assembly of July 1, 1947 (*Actes*, p. 2598)). The Allied and Associated Powers cannot fail to have been informed of these studies, and at the moment of the signature of the Treaty, February 10, 1947, those Allied and Associated Powers cannot reasonably have thought that in the brief period of time which remained before the Treaty was to come into force (on September 15, 1947), a special capital levy duty completely different from that which had been the subject of two years' study was going to be imposed in Italy. During these studies, M. Corbino, who was Finance Minister in the immediate post-war period, made a point of noting (in his speech to the Constituent Assembly of September 20, 1946 (*Actes*, p. 651)) the opportunity which Italy had to defer the institution of the capital levy duty ' for another reason ', namely, ' that in the articles of the Peace Treaty aforesaid, there is one which is very burdensome ; that is, the following : " Nationals of States belonging to the United Nations will have to be exempted from any exceptional tax having for its purpose the payment of the expenses of the war and which may be imposed between the date of the Armistice and the year [*sic*] of entering into force of the Treaty ". Now, to impose in such circumstances a tax on capital, extending it particularly, as is proposed, to personal assets [*capitaux mobiliers*], would be in effect to exempt from the tax a very considerable part of the national capital, namely, that which is owned by foreigners and that which accommodating foreigners might represent as belonging to them for the purpose of a special capital levy duty.' "

During the debates which resulted in Law No. 828 of September 1, 1947, it was justly pointed out how the special tax then imposed was analogous to that which had been introduced after the war of 1914–18, and the causal connection of which with the cost of that war had always been universally recognised (*cf.* Report of M. Campilli, the Finance Minister, presented to the sitting of March 1927 of the Constituent Assembly, p. 2, and the report of M. La Malfa presented to the same sitting, pp. 2 and 3).

On behalf of the Italian Government, an attempt was made to demonstrate a subtle distinction between the major burdens on the Italian budget consequent upon the Second World War: those which had their origin in the troubles of the time which, even if Italy had been neutral or non-belligerent, would have been a charge on the Exchequer; and those which were caused by her entry into the war. Only the latter [so it was argued] could be linked from a juridical point of view with the responsibility of the State, and it is only to taxes designed to cover them that, in consequence, Article 78 (6) of the Treaty applies. To that the reply can be given that it appears practically impossible to determine, in a kind of retrospective prognosis [*sic*], what consequences a policy of non-belligerency or neutrality would have had on the Italian budget. Those expenses, at all events, would in the ordinary course of things have been less than those which were caused by a war waged and lost, and they would probably not have made necessary special capital levy duties of the amount of those which are in question.

" That is the explanation why the draftsmen of the Treaty used the expression ' charges arising out of the war ', an expression of a general character which leaves no scope for the distinction which was propounded on behalf of the Italian Government and which is founded on an unrealised hypothesis."

[Report: *Recueil des Décisions*, Part 1, p. 95.]

Case No. 129 **Treaties—Interpretation of—Various Rules of—General Principles of Interpretation—Necessity of Interpretation even when Text prima facie Clear—Canons of Interpretation as used for Municipal Laws and for Contracts—"The Sense of the Words"—"The Context"—Grammatical Analysis—"A Reasonable Meaning"—Comparison with Other Parts of the Treaty—*Travaux préparatoires*—Presumption of Simplicity of Expression—"The Intention of the Parties"—Treaty not Freely Negotiated—"The Spirit of the Treaty"—Peace Treaty of Paris, 1947—Meaning of "injury or damage suffered as a result of the war".**

PERTUSOLA CLAIM.

Franco-Italian Conciliation Commission.
(Perier de Ferel, Sorrentino, Bolla.)
March 8, 1951.

THE FACTS.—This was a claim on behalf of an Italian company, the Pertusola Mineral and Metallurgical Company, under paragraphs 1 and 4 (*a*) of Article 78 of the Peace Treaty of Paris, 1947, for compensation for loss suffered, as a result of the war, by reason (*a*) of war damage to the Company's property in Italy, and (*b*) the sequestration as enemy property, in 1940, of that property, some of which had not been restored to the Company. The present dispute turned on the interpretation of paragraph 4 (*a*) of Article 78 of the Treaty of Peace,[1] and in particular the expression " as a result of the war " (" *du fait de la guerre* "). The question was, whether the obligation of partial compensation created by this sub-paragraph extended to all the losses caused by the war (including loss resulting from sequestration) to a United Nations national as owner of property in Italy on June 10, 1940, or only to a certain category of such losses, namely, those caused by " acts of war " (" *faits de guerre* " [2]), *i.e.* war damage.

Held (by a majority): that the claim must succeed both as to the property not restored to the Company after sequestration and as to the property which had suffered war damage (*dommage résultant de faits de guerre*). The Commission said:

---

[1] Article 78 (4) (*a*) provides :

" The Italian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Italian nationals."

[2] This expression appears to correspond to what is described in Section 2 (1) of the [United Kingdom] War Damage Act, 1943, as " the direct result of action taken by the enemy, or action taken in combating the enemy . . . [or] of measures taken . . . to avoid the spreading of, or otherwise to mitigate, the consequences of [damage caused thereby] ".

"According to the generally accepted opinion in public international law, in the interpretation of international treaties there may be applied, as a rule, most of the general principles adopted in municipal law for the interpretation of contracts. But the function of the interpreter is, in effect, the same whether a contract or a law is in question. It consists, in both cases, in determining through its external manifestation the juridically efficient content of an intention (' *une volonté* '). The criteria to which the interpretation of contracts should conform are therefore analogous to those which govern the interpretation of laws, save that, in the case of contracts, the effective will can also be found outside the verbal expression thereof, while, in the case of a law, the effective will or intention is impersonal and is therefore crystallised in the text.

"It has been argued for the French Government that, in this instance, the text of the Treaty is so clearly expressed and so categorical that any interpretation would appear unnecessary, indeed, dangerous. To give words or expressions contained in an instrument a sense wider or more restrictive than that which corresponds to the definitions of those words or those expressions or, perhaps, a sense which would be contrary thereto, would amount to distorting the text or, rather, to contradicting it. There is scope for interpretation only if the text is obscure or ambiguous, or if it is in irreducible contradiction with another provision of the Treaty—and no such contradiction is alleged even on behalf of the Italian Government.

"In reality, however, the old maxims ' *in claris non fit interpretatio* ' and ' *clara non indigent interpretatione* ' are repudiated by the most authoritative modern teaching of every country. The abstract juridical norm, in order to be applied to a concrete instance, must always be interpreted in this sense, namely, the interpreter must by a process of reasoning determine its content.

"Moreover, the text of Article 78 (4) (*a*) of the Treaty by no means discloses the intention behind its provision so clearly that any recourse to the accepted methods of interpretation appears superfluous. It must, in this respect, be conceded to the argument put forward on behalf of the French Government that the expression ' *du fait de la guerre* ' means without any doubt in French ' *par effet de la guerre* ', ' *à cause de la guerre* ', ' *résultant de la guerre* ', and that it therefore has no other meaning than the expression used by the English draftsmen of the Treaty at that point: ' as a result of the war '. (Neither of the parties relied on the Russian text.)

"But if the interpreter must explain the meaning of the provision by reference to the sense of the words and phrases employed, he cannot determine the sense of those words and

Case No. 129 *Contd.* those phrases without having regard to their connexion with the rest of the Treaty. In the sub-paragraph under discussion, the intention of the Treaty is to confer on United Nations nationals a right to compensation against the Italian Government. For such a right to arise, it is, however, not sufficient that these nationals should have suffered *une perte* (' a loss ' in the English text) ; it is not even sufficient that there should exist a causal nexus between the loss and the war ; the loss must relate to property (and in particular not to personal injury) and more precisely to property situate in Italy and belonging to a United Nations national on June 10, 1940 (see paragraph (1) of Article 78). That is not all ; sub-paragraph (*a*) restricts the right to compensation even further by imposing a final condition, that the property shall have sustained '*atteinte*' [injury] or '*dommage*' [damage] of which the loss to be compensated is the result. It is the term '*atteinte*' which, it would appear, must here guide the interpreter, for it would be meaningless, or at least tautological, to speak of a loss suffered as the result of damage. And the term '*atteinte*' must not be taken in its sense of ' tort ', or one would fall into the same error, the same tautology. '*Atteinte*' must rather be taken, in sub-paragraph (*a*), in its other sense of a blow with which one is struck.

" If that is so, the word '*dommage*', used along with the word '*atteinte*', must, it would appear, mean not damage as an effect (that is, as a loss), but as a cause, that is to say, a fact which causes loss or injury [*fait dommageable*]. Although sub-paragraph (*a*) speaks only of ' property ', and not, as do paragraphs 2 and 3, of ' property, rights and interests ', the definition of the expression ' property ' given in paragraph 9 (*c*) of Article 78 applies, in principle, also to sub-paragraph (*a*), it being, however, understood that it is not at all necessary to interpret each provision of Article 78 in such a way that it will apply to every kind of property mentioned in paragraph 9 (*c*). One can therefore assume that the draftsmen of the Treaty had in view, in sub-paragraph (*a*), on the one hand the fact causing loss or injury ('*dommage*') in respect of property in the strict meaning of the word, and, on the other hand, the fact causing loss or injury ['*atteinte*'] in respect of a right or a legal interest.

" What has to be compensated by the Italian Government, according to sub-paragraph (*a*), is, therefore, not the loss caused by the state of war to the United Nations national as owner of property in Italy, but the loss to him resulting from *un fait dommageable*, an injury which has been caused to the said property, in consequence of the state of war. This distinction could only be rejected if one started with the idea that the phrase ' In cases where . . . as a result of the war a United Nations national has suffered a loss by reason of injury or damage to property in Italy ' contains a pleonasm, the Treaty having in reality intended to envisage quite simply the hypothesis that, as a result of the war, the fact of owning property in Italy had brought about damage to the United Nations national. But the use of pleonasms cannot be presumed, nor can one assume that the draftsmen of the Treaty had knowingly had recourse to a tortuous phrasing to express what is after all quite a simple idea.

" In brief, if the expression '*du fait de la guerre*' appears clear in itself, it ceases to be so as soon as it is compared, as it should be, with the idea of 'injury or damage to property in Italy'. (It should not be compared with the same idea in paragraph 2 of Article 78, where 'encumbrances and charges of any kind' are in question.) It is not sufficient that the damage, in order to give rise to an obligation to compensate, should have as its sole cause the state of war; it requires in addition an event which is due to that state and which has injured such property in Italy as is subject to restitution in the sense of the first part of sub-paragraph 4 of Article 78. A grammatical analysis shows that it is not enough for there to be a causal nexus between the damage which ownership of property in Italy had brought about to a national of an Allied or Associated Power and the state of war which existed between Italy and the Allied and Associated Powers. There must also be a direct causal nexus between the damage and a *fait dommageable* which was due to the war and which has affected the property.

". . . An interpreter must strive to give a reasonable meaning to the condition imposed by the Treaty. It is especially and primarily by '*faits de guerre*' that the state of war causes injury to property—or at least an injury calling for special settlement. From an economic aspect, war damage is all damage caused by '*faits de guerre*'. [The Commission here cited a number of writers of the period of the First World War on the general law concerning compensation for war damage.] An interpreter called upon to give a reasonable meaning to the condition imposed by the words 'by reason of injury or damage to property' is led naturally to think that the authors of the Treaty had in mind current ideas concerning war damage. It is to be noted that that expression also appears to say more than is really intended; moreover, '*faits de guerre*' can perfectly well cause injury to rights and legal interests—for example, rights of usufruct or of residence—and even to rights in industrial, literary and artistic property (as, for example, the destruction, as the result of a fire started by a bomb, of the only manuscript of a literary work).

" A reasonable interpretation must confirm or otherwise the conclusion to which the interpreter has been led, in any given instance, by a grammatical analysis of a passage taken in isolation.

Case No. 129 *Contd.*

"It is expedient to find out first if that conclusion can be reconciled with the terminology generally used in the Treaty. The interpretation of one provision can, in fact, find support in other provisions of the same instrument, in which the same expressions recur."

The Commission then examined Article 76 (1), which speaks of "claims arising directly out of the war or out of actions taken because of the existence of a state of war", and Article 76 (2), which speaks of "non-combat damage claims" (in the French text: "*dommages . . . ne résultant pas de faits de guerre*"), and decided that, in Article 76 (1), the use of the word "directly" did not exclude claims resulting indirectly from the war, and that in Article 76 (2) the "non-combat damage" claims referred to were included in the generality of claims dealt with under Article 76 (1).

The Commission also took into consideration that paragraphs 1 and 2 of Article 76 were "the literal reproduction of paragraphs 1 and 2 of Article 66 of the draft which emerged from the first phase of the work of the Council of Foreign Ministers (see Vedovato, *Il trattato di pace con l' Italia*, pp. xiv and xvi), while Article 78 (4) (*a*) results from a proposal of the United States Delegation, which incorporated almost without alteration the words "In cases where as a result of the war, the property cannot be returned, or a United Nations national has suffered a loss by reason of damage to the property . . . ". "It is understandable that the drafters of the United States proposal did not remember, or did not care for, the way in which Article 76 (1) and (2) had been drafted by the Council of Foreign Ministers, otherwise . . . the proposal . . . like Article 76 (1), would have spoken of losses due to 'the existence of a state of war . . . '.

"If it is good drafting to employ, in the same treaty, the same expression every time the same thing is referred to, it sometimes happens, even in international instruments which are drafted with care (which is not always the case with the present Treaty), that that principle is no more followed than the other, equally excellent, rule that one should use different expressions to indicate different things. An interpreter is likely to find himself distorting passages if he imagines that their drafting is stamped with infallibility."

The Commission examined Articles 80, 77 (4) and 79 (6) of the Treaty, and said: "At the end of it all, the only conclusion that can be drawn from a comparison of these passages is that the wording of the Treaty is entirely lacking in scientific precision, that [the draftsmen] hardly concerned themselves, at least in these instances, with questions of agreement [between different Articles]. There are writers who have expressed regret that, at the time when the Treaty was being drawn up, the Conference of 'the Twenty-one' did not seek more assistance from the technical ability of the legal and drafting Commission (Vedovato, *op. cit.*, p. xxiii). It may be that some imperfection in drafting was inevitable, given the necessity of reaching agreement, in a relatively short time, among a whole series of victorious States whose interests were sometimes divergent, on a large number of political, economic, military, etc., questions ; and of drawing up the Treaty in three texts, English, French and Russian, all of which were to be authentic. It is well known how the genius of those languages differ, not to mention differences of form.

" In these circumstances, one cannot but have recourse to the spirit of the Treaty : '*Scire leges non est verba earum tenere sed vim et potestatem*' (1.2.C. de leg. 1.14). It is expedient, in this respect, to proceed to examine the entire section [of the Treaty] in which is found the passage to be interpreted : '*Incivile est nisi tota lege perspecta una aliqua particula eius proposita, iudicare vel respondere*' (1.24 D.1.3)."

The Commission then examined the several paragraphs of Article 78 of the Treaty and in particular paragraph 4 (*a*), which imposed on Italy the obligation to pay to United Nations nationals compensation amounting to no more than two-thirds of the loss (subject to treatment at least equal to that accorded to Italian nationals). Of this sub-paragraph the Commission said : " By this reduction, the Allied and Associated Powers intended to show their concern for the financial situation of the Italian State. That concern could hardly be reconciled with the imposition on Italy of the obligation to pay compensation . . . for all damage resulting from the war and suffered by United Nations nationals who owned property on Italian territory on June 10, 1940. On the other hand, it would have been, on the part of the Allied and Associated Powers, inequitable to their own nationals who had suffered war damage in Italy to abandon the right to one-third of the compensation for such damage in order to assure to other nationals who had suffered a loss in Italy, due not to '*faits de guerre*' but to complex economic phenomena resulting from the war, compensation for two-thirds of that loss. . . .

" Hitherto, we have proceeded to interpret the Treaty as though it were a law. But, as already indicated, there is scope for the application to the interpretation of treaties of most of the general principles which hold good in municipal law for the interpretation of contracts, especially to find the true common intention of the parties without fastening on inexact expressions or descriptions which they may have used. Indeed, an exception to the rule is justified when it is a matter of a treaty of peace which was not negotiated, but which the defeated State had to accept as it was presented by the victorious State. In any event, even on that hypothesis, it is not without interest, in the first place, to ascertain the true intention of the victorious

Case No. 129 *Contd.*

State, although, naturally, only the intention manifested by it in the text of the Treaty may be imposed on the defeated State. The enquiry, moreover, is much the same as the determination, in the case of a law, of the will of the legislator, through the study of the preparatory work. In the second place, even though the Treaty of Peace was not negotiated, Italy had the opportunity of stating in writing her observations, and of explaining these orally, by invitation, at the preliminary plenary sessions of the Conference of Paris (Vedovato, *op. cit.*, p. xxiii). It is therefore permissible, in order to interpret the Treaty, to make deductions from the attitude taken by the Allied and Associated Powers on receipt of these observations.

" As regards the true intention of the Allied and Associated Powers, the origin of Article 78 (4) (*a*) is to be found in a proposal put forward by the Representative of the United States to the Committee of Economic Experts which was assisting the Council of Foreign Ministers. In the report of June 5, 1946, of this Committee to the Conference of Deputies of the Council of Foreign Ministers, it is said (p. 5) : ' The Representative of the United States is of opinion that when, as the result of the war [*par suite de faits de guerre*], the property itself cannot be returned, or has been damaged, the interested party ought to be completely compensated in lire '. It was thus '*faits de guerre*' which were envisaged as the only cause which would give rise to compensation for damage. In translating this idea into a draft Article, the Representative of the United States nevertheless no longer spoke of '*faits de guerre*' but employed, for the first time, the expression '*du fait de la guerre*', which was not further modified when it appeared in the proposal [cited above]. But the American proposal contains also a definition of the expression '*du fait de la guerre*' (*ibid.*, p. 6) : ' For the purpose of the present article, the expression "*du fait de la guerre*" includes the consequences of every measure taken by the Italian Government, of every measure taken by one of the belligerents, of every measure taken in execution of the Armistice of September 3, 1943, and of every act or omission resulting from the existence of a state of war'. . . .

" The idea of total compensation put forward by the United States, at first approved, subject to drafting amendments, by France and Great Britain, met with the opposition of Russia, who was of opinion that the compensation should be partial, that is, one-third of the damage. The matter was referred back to the Economic Commission for Italy. The report of the Commission, dated October 7, 1946, tells of the fate of the proposal. At the end of a long series of votes on amendments, the Commission decided, by a simple majority, to introduce into the Treaty a distinction between damage resulting from special measures taken during the war by the Italian Government, which did not affect Italian nationals, on the one hand, and, on the other hand, a loss suffered, as a result of the war, by reason of injury or damage to property. The Commission decided on complete indemnity in the first case and compensation to the extent of 75 per cent. in the second case (pp. 27 and 28). The United Kingdom Delegation followed the vote by a declaration (p. 28) in favour of the principle of complete indemnity, but that must be understood as an objection to the 75 per cent., and not as being in favour of a wider definition of the damages giving rise to compensation. That results quite clearly from the British Note, Annex 12 to the said Report, which recalls that ' in the United Kingdom the property of aliens was comprised in the various schemes of compensation for war damage in the same way as the property of British subjects ' ; it was recognised that ' unfortunately, it is not possible to require a complete indemnity for all the losses caused by a modern war ' ; it was remarked that the resulting charge on the Italian Government of 100 per cent. compensation would have as counterpart the ' restoration to complete good order of the property ' which would ' contribute to the re-establishment of the Italian economy '. The United Kingdom therefore had in view a complete indemnity for war damage of the kind which gave a right to indemnity in that State, and not for all losses caused by the war. It regarded the latter compensation as impossible.

" In the result, the 75 per cent. gave way to 66·6 per cent., which was applied to both kinds of losses—those resulting from an actual '*fait de la guerre*' and those resulting from discriminatory measures. One thing is certain, namely, that the United States Delegation, when in its proposal it mentioned loss '*du fait de la guerre*', had in mind, in reality, only losses '*de guerre*', that is, due to '*faits de guerre*' ; and it is in that sense that the proposition was understood by the British Delegation, for whom compensation such as is today demanded on behalf of the French Government represented an impossibility.

" As regards the meaning which Italy attributed to Article 78 (4) (*a*), it appears that where Italy recognised, and should recognise, that it was intended to saddle her with the payment of compensation for loss occurring on Italian territory and not resulting from '*faits de guerre*' (Article 76 (2)), she entered a protest (see Vedovato, *op. cit.*, pp. 453, 454 and 461). She abstained from any such protestation in respect of the American proposal which resulted in Article 78 (4) (*a*), because she realised that that proposal tended to make her responsible for compensation only for damage resulting from *faits de guerre*. That results unquestionably from the Memorandum which she presented to the Conference (No. 80, at pp. 466–467 in the work of Vedovato already cited). In that memorandum the

Case No. 129 *Contd.* Italian Delegation emphasised that it was proposed to charge Italy with ' the obligation of providing a complete indemnity for damage caused both before and after Italy's entry into the war on the side of the United Nations against Germany, as a result of *force majeure*, of Allied or German military operations and as a result of measures taken by Germany and the United Nations ; in short, war damage suffered by property situate in Italy, that is to say, damage which, in principle, ought to be compensated to the same measure as damage to the property of Italian nationals '. The Italian Delegation found that this treatment reserved for Italy was harsh ; it did not, however, ask for its suppression ; but in view of the extreme severity of the treatment, and on moral grounds, the Delegation asked, by way of alleviation, that Italy should not have to meet damage due to warlike operations or to measures taken, after October 13, 1943, by the Germans to the detriment of property belonging to the United Nations or their nationals. It is self-evident that the Delegation would not have claimed merely this temporal limitation on the scope of the provision [Article 78 (4) (*a*)] if it had interpreted the latter as extending to anything beyond war damage properly so called.

" From this Memorandum, the High Contracting Parties could have understood that Italy interpreted the expression '*du fait de la guerre*' in the context of Article 78 (4) (*a*) as referring solely to war damage properly so called. If that interpretation did not correspond with their intention, the rules of good faith made it obligatory for them either to draw the attention of the Italian Delegation to the misunderstanding, or to modify the drafting of the sub-paragraph so as to exclude the interpretation given by the Italian Delegation : such a modification would have been very simple.

" In these circumstances, it is not necessary to invoke the principle of '*favor debitoris*' ('*benignius est interpretandum* ; *in obscuris quod minimum est, sequimur*') which, in case of doubt, is as valid for treaties as it is for contracts, especially when it is a matter of a treaty which was not negotiated but drawn up by the creditor (*Nuovo digesto italiano*, vol. IV, p. 73)."

In conclusion, the Commission said : " The question whether, in a given case, a loss has been suffered ' by reason of injury or damage to property in Italy '—that is, in other words, if the damage has a causal connexion with the war sufficiently direct for the Italian Government to be bound to make compensation—is a question of the interpretation of an idea laid down by the Treaty, which does not, in this regard, refer to any municipal legislation concerning compensation for war damage.

" As regards [the claim of the Pertusola Company] . . . the mines did not suffer damage as a result of warlike operations : they suffered damage because they were not properly maintained; and they were not maintained because it did not seem profitable to work them in view of the naval and aerial operations in the Mediterranean which prevented the transport of minerals on the Continent. The war was therefore clearly only an indirect cause of the loss. The latter was certainly suffered 'as a result of the war' but not 'by reason of injury or damage to property in Italy'."

The Commission decided that "on the basis of Article 78 (4) (*a*) the Pertusola Company is entitled to compensation to the extent of two-thirds of the loss which it has suffered by reason of the non-restoration of property which it owned in Italy on June 10, 1940, and of the loss which it sustained on account of war damage (*dommage résultant de faits de guerre*) to [such property]".

[Report: *Recueil des Décisions*, Part III, p. 67.]

NOTE.—The French member of the Commission appended to the Judgment a dissenting opinion dated April 18, 1951.

Treaties—Interpretation of—Rules of—*Expressio unius non est exclusio alterius*—Rejection of Restrictive Interpretation—"The Plain Terms of the Treaty"—"The Spirit of the Treaty"—*Reductio ad absurdum*—Peace Treaty of Paris, 1947—Restoration of Requisitioned Property—Requirement of Physical Restitution—Immateriality of Allied Occupation of Sicily—Immateriality of Recognition of Italy as Co-belligerent. **Case No. 130**

DUC DE GUISE CLAIM.

Franco-Italian Conciliation Commission.
(Bolla, Perier de Feral, Sorrentino.)
September 15, 1951.

THE FACTS.—This was a claim by the heirs of the Duc de Guise in respect of his property, the Palais d'Orléans, at Palermo (Sicily), which had been sequestrated as enemy property in 1940. When the Allies landed in Sicily in 1943, the Palais was requisitioned by the Allied forces and later derequisitioned. In 1944 and 1945 the property was again requisitioned, this time by the High Commissioner for Sicily. In February 1945, the sequestration was lifted and a *procès-verbal de restitution* dated June 10, 1946, drawn up, but the Palais was never effectually restored to the claimants. In August 1947 the President of the Sicilian Region issued a decree ordering the requisition of the Palais for an indefinite period. On September 15, 1947, the Treaty of Peace between Italy and the Allied and Associated Powers came into force.

On behalf of the claimants, the French Government applied

Case No. 130 *Contd.*

to the Commission, under paragraphs 1 and 2 of Article 78 of the Treaty,[1] for the restoration of the Palais to the claimants. It was contended that the requisition decrees of 1944, 1945 and 1947 were measures which the Italian Government were bound under the Treaty to annul and that, in any event, the effects of those measures constituted a charge from which the owner of the property had the right to be released.

For the Italian Government, it was contended that the decrees of 1944 and 1945 were not measures of the kind envisaged in Article 78 (2) of the Treaty, because there was no connexion between the requisition and the state of war. They were measures ordered by virtue of ordinary administrative laws, applicable to the property of Italian nationals and aliens alike, whether or not under sequestration. The measures contemplated by Article 78 (2) of the Treaty could comprise only those which discriminated against enemy property.

Held (by a majority) : that the claim must succeed. The Italian Government was under an obligation to make complete and effective restitution of the Palais d'Orléans to the heirs of the Duc de Guise. The Commission said :

" By Article 78 (2) of the Treaty, Italy undertook to annul all measures taken against United Nations property between June 10, 1940, and the date of the coming into force of the Treaty. It is immaterial whether the measure was taken against any one property or against all the property of one of the United Nations or of United Nations nationals. It is not necessary that the measures should be special measures taken during the war against the property of United Nations nationals and to the exclusion of Italian property. A special measure of that kind can, moreover, if the other conditions are fulfilled, give rise to an action for compensation against the Italian Government, under Article 78 (4) (*d*) [2] of the Treaty. But even if the special measure was not of a discriminatory character, it must cease to have effect on the coming into operation of the Treaty. The measure must, of course, have been taken ' as a result of the war '.

---

[1] Article 78 provides :

" (1) In so far as Italy has not already done so, Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists.

" (2) The Italian Government undertakes that all property, rights and interests passing under this Article shall be restored free of all encumbrances and charges of any kind to which they may have become subject as a result of the war and without the imposition of any charges by the Italian Government in connection with their return. The Italian Government shall nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between June 10, 1940, and the coming into force of the present Treaty. . . ."

[2] Article 78 (4) (*d*) provides :

" The Italian Government shall grant United Nations nationals an indemnity in lire at the same rate as provided in sub-paragraph (*a*) above to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Italian property. This sub-paragraph does not apply to a loss of profit."

" That conception is to be found in the first sentence of Article 78 (2) of the Treaty, which determines the modalities of the obligation of restitution, and, moreover, even the second sentence speaks of measures taken ' between June 10, 1940, and the date of the coming into force of the present treaty '—that is to say, during the state of war.

" It is also necessary that the measure forms an obstacle—if its effects persist—to the fulfilment of the obligation undertaken by the Italian Government to restore to the United Nations or to their nationals the property which they owned in Italy on June 10, 1940. The measures envisaged in Article 78 (2) of the Treaty must be annulled in so far as their maintenance in force prevented the restoration of property ' free of all encumbrances and charges of any kind to which they may have become subject as a result of the war ' under the first sentence of the paragraph.

" It is not necessary to demonstrate that in this case the second condition has been fulfilled. The Treaty requires more than a purely formal or symbolic restitution : it requires that the owner of the property should recover the unfettered disposal of it *de jure et de facto*. . . . The heirs of H.R.H. the Duc de Guise did not have such disposal of the property on the date for restoration certified by the *procès-verbal* of June 10, 1946. . . .

" The first condition has similarly been fulfilled in this case. The requisition of 1944, during the military operations in Italy, and affecting property which was already under a wartime sequestration, was based on war legislation. . . . On the other hand, it was the destruction caused by military operations in the town of Palermo that made it necessary for the High Commissioner for Sicily to requisition the Palais d'Orléans for the accommodation of his staff.

" No conclusion can be drawn from the fact that the measures mentioned in Article 78 (2) of the Treaty are all of a discriminatory character (' seizures, sequestrations or control '). The Treaty does not require the Italian Government to nullify [only] measures of seizure, sequestration or control, but all measures, including seizure, sequestration and control. The latter are not enumerated to indicate the kind of measures which must be annulled, but purely so as to establish quite clearly that they are included in the requirement of the paragraph.

" If, as was contended for the Italian Government, the measures mentioned in Article 78 (2) of the Treaty comprised only those which discriminated against enemy property, measures not of that kind would have to be comprised under the ' charges of any kind ' mentioned in Article 78 (1), provided

Case No. 130 *Contd.*

that they were due to the war and that they deprived, in part or wholly, an owner of the free disposal of his property. . . . In any event, a restrictive interpretation of both the idea of 'charges of any kind' and of 'all measures' mentioned in Article 78 (2) would be contrary to the clearly expressed intention of the draftsmen of the Treaty and to the spirit of Article 78 (1), and its effect would eventually be to permit the Italian Government to refuse to restore property because it had been requisitioned under war legislation as a result of the state of war and as a consequence of *faits de guerre*.[1] . . .

" It is self-evident that, once the Treaty of Peace has come into force, the property in Italy of United nations nationals becomes subject to the limitations and obligations to which private property is subject in Italian law, irrespective of the nationality of the owner. Among such limitations are [liability to] expropriation or requisition, against compensation, of the property for public purposes. But, in the present case, we are dealing with property which, as enemy property, was put under sequestration and which, when the sequestration was lifted, was not restored to its owner, as it was the object of a requisition levied during warlike operations, under a law which applied only in time of war, under an administrative necessity brought about directly by the war. The fundamental character of this measure cannot in any way have been changed, from an international point of view, [by the re-requisitioning] in August 1947, on the eve of the end of war-requisitioning and the entry into force of the Treaty of Peace : the cause, the object and the means remain, in fact, the same. . . .

" It is immaterial in the present case that on November 21, 1944, the Allied and Associated Powers exercised administrative control in Sicily, seeing that no evidence has been brought to show either intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees of 1944 and 1945. Nor is it material that on the same date Italy was recognised as a co-belligerent by the Allied and Associated Powers. That status was taken into consideration by the draftsmen of the Treaty of Peace (*vide* its preamble [2]) and it cannot have in the operation of the Treaty any other effect than that recognised in the Treaty."

[Report : *Recueil des Décisions*, Part 3, p. 119.]

NOTE.—The Italian representative is recorded as disputing that the requisition which prevented the restitution of the property constituted a measure which was a result of the war.

---

[1] For the meaning of this expression, see *supra*, p. 414, n. 2.

[2] The fourth paragraph of the Preamble recites as follows :

" Whereas after the said Armistice Italian armed forces, both of the Government and of the Resistance Movement, took an active part in the war against Germany, and Italy declared war on Germany as from October 13, 1943, and thereby became a co-belligerent against Germany ; . . ."

Treaties — Interpretation of — Literal Interpretation —Time Limits—Whether Letters Written by United Nations National Claimant to Italian Government Constitute Sufficient " application to the Italian authorities "—Peace Treaty of Paris, 1947. **Case No. 131**

PIEDMONT SILK-WEAVING COMPANY'S CLAIM.

Franco-Italian Conciliation Commission.
(Perier de Feral, Sorrentino, Bolla.)
December 1, 1950.

THE FACTS.—In 1935 the Piedmont Silk-Weaving Company (hereinafter called " the Italian Company "), owned by Établissements les Petits-Fils de C. J. Bonnet, S.A. (hereinafter called " the French Company "), went into liquidation. The winding up had not been completed when Italy declared war on France on June 10, 1940. The Italian Company was put under sequestration and an official liquidator appointed, who in 1943 sold the business of the Company to an Italian purchaser. In May and again in December 1947, the French Company applied by letters to the Italian authorities for the restoration of their property. There was no reply to the letters. On November 20, 1948, the French Government applied on behalf of the French Company to the Conciliation Commission for cancellation of the sale, restoration of the business and compensation under Article 78 (4) of the Treaty of Paris. The Italian Government objected that the application ought to have been made not on behalf of the French Company but on behalf of the Italian Company, and the Commission on March 16, 1949, upheld the objection. The French Government, therefore, on the same date, presented the claim on behalf of the Italian Company " in which [the French Company] as principal shareholders, are interested ". The Italian Government then objected that this new claim having been presented more than twelve months from the coming into force of the Treaty was out of time and therefore must be dismissed. Against this objection, it was contended on behalf of the French Government that the terms of twelve months prescribed by Article 78 (2) of the Treaty of Peace was of a merely administrative character, and failure to observe it could not deprive a United Nations national of his right to recover property in the possession of the Italian Government or of an Italian national. Article 83 of the Treaty, which set up the Commission, did not prescribe a period of time within which claims had to be submitted. The neglect of the Italian authorities to deal with the application put forward in 1947 could not prejudice a claim before the Commission. The present claim by the Italian Company ratified what was done for it by the French Company. In reply, it was contended on behalf of the Italian

Case No. 131 *Contd.* Government that the time limit prescribed in Article 78 was of the essence of the right to present a claim before the Conciliation Commission; it was a maximum; and it was peremptory. The application of the French Company could not be regarded as extending the time, because it had not the right to represent the Italian Company.

Held: that the objection of the French Government must fail: the twelve months' limitation in the Treaty must be interpreted strictly. The Commission said:

"[Paragraph 2 of] Article 78 of the Treaty of Peace, after defining [1] the scope of the obligation of the Italian Government to restore to the United Nations and their nationals their property as mentioned in paragraph 1, continues:—'In cases where the property has not been returned within six months from the coming into force of the present Treaty, application shall be made to the Italian authorities not later than twelve months from the coming into force of the present Treaty, except in cases in which the claimant is able to show that he could not file his application within this period'. This does not make the presentation of the claim to the Italian authorities within twelve months from the coming into force of the Treaty a necessary condition precedent of the international obligation upon the Italian Government to effect restitution of property. Such an obligation exists by virtue of the Treaty, and a period of six months from its coming into force is given to the Italian Government to perform that obligation. If it is not performed within the six months' period, then a claim for restitution may be made to the Italian Government within the six months following. The prescribing of this period within which a claim for restitution must be made is not, as was contended on behalf of the French Government, a mere administrative direction (*mesure d'ordre*). That argument could not be reconciled with the *restitutio in integrum* provided by Article 78 (2). If the failure to observe the limitation of twelve months from the entry into force of the Treaty had not, in the minds of the draftsmen of the Treaty, involved a complete forfeiture of the right, they would not have gone to the trouble of excluding such a consequence 'in cases in which the claimant is able to show that he could not file his application within this period'. It was the intention of the Treaty that, after the lapse of a reasonable period from its entry into force, the Italian Government should be able to estimate the actual extent (allowing for claims delayed by *force majeure*) of the [aggregate of the] international obligation which is imposed on it. The Treaty could just as easily provide for a sanction of strict forfeiture of rights on default, since the forfeiture strikes only at direct action against the Italian Government in the accomplishment of its international obligation, to the exclusion of actions which would be available to the owner of the property (whether State or individual) under the relevant municipal law."

---

[1] See *supra*, p. 424, n. 1.

The Commission held, however, on the facts of this case, that the letters written in May and December 1947 by the French Company to the Italian authorities constituted a submission of the claim within twelve months from the coming into force of the Treaty.

[Report: *Recueil des Décisions*, Part 3, p. 5.]

Treaties—Interpretation of—Various Rules of—*Expressio unius est exclusio alterius*—Interpretation *contra proferentem*—Contract between Ruler and Private Company.

See Case No. 37 (*Petroleum Development Ltd.* v. *Sheikh of Abu Dhabi*).

iii.—Bilingual Treaties

Treaties—Interpretation of—Foreign Text of Treaty—Whether Binding on Municipal Court—Recourse to Preparatory Work. **Case No. 132**

CHAMMAS *v.* MINISTRY OF THE INTERIOR.

Egypt, Conseil d'État. May 15, 1951.

THE FACTS.—This was a motion to set aside an order of the Ministry of the Interior expelling the plaintiff from Egyptian territory and for damages in respect of the period of his imprisonment pending expulsion. The plaintiff alleged, *inter alia*, that he was of Egyptian nationality and that even if he was an alien he should not have been expelled because, according to the French text of one of the annexes to the Montreux Convention, the expulsion of aliens from Egypt was not lawful unless such aliens had been sentenced to a term of imprisonment exceeding three years. The Egyptian Government, he maintained, was not entitled to invoke the Arab text of the annex nor the text of an Egyptian Decree on the expulsion of aliens, according to which an alien could be expelled if convicted of an offence carrying a term of imprisonment exceeding three months, for the Montreux Convention provided that if there was a difference between texts, the French version was authoritative.

Held: that the motion must fail. The Court said:

" In so far as concerns the argument of the plaintiff that the Government is bound by the French version of one of the annexes to the Montreux Convention limiting expulsion to cases where the alien has been convicted of an offence punishable with more than three years' imprisonment, the Court,

Case No. 132 *Contd.* upon examining the declaration of the Egyptian Government made on May 8, 1937, finds that Article 4 of the Declaration provides that the expulsion of an alien may take place if the latter has been found guilty of an offence punishable by imprisonment for more than three months. This Declaration constitutes Annex 4 of the Montreux Convention, which was ratified by the Egyptian Parliament and formed the subject of the Decree of 1938. The Court cannot recognize any right of the plaintiff to avail himself of the discussions and preparatory work preceding the conclusion of international treaties, for such a right belongs only to the High Contracting Parties. Our courts can take account only of the Law ratifying the Treaty, and can only consider the Arab texts.

" The decision ordering the expulsion of the plaintiff was taken according to law."

[Report: *Revue égyptienne de Droit international*, 7 (1951), p. 136.]

Note.—The above case is reported solely for the legal interest of the judgment. The argument of the plaintiff seems, however, to have no basis in fact. Thus, Article 14 of the Montreux Convention provided as follows:

" The present Convention, with the exception of the annex referred to in Article 3, has been drawn up in the English and French languages. Both texts shall be equally authentic for the purposes of its interpretation. In the case of the annex aforesaid, the French text alone shall be authoritative." The annex mentioned in Annex 3 of the Convention contains the *Règlement d'organisation judiciaire* and not the Declaration of the Egyptian Government referred to in the judgment. This Declaration, signed on May 8, 1937, contains in the French and English texts the following provision (Article 4):

" Although the abolition of capitulations entails the removal of all the existing restrictions on the Royal Egyptian Government's right to deport foreigners who are within Egyptian territory, nevertheless that Government does not intend to exercise during the transition period its right of deportation in respect of a foreigner subject to the jurisdiction of the Mixed Tribunals, who shall have resided in Egypt for at least five years, or to refuse such a foreigner access to Egyptian territory if he has temporarily quitted that territory, unless: (*a*) he has been convicted in respect of a crime or misdemeanour punishable by more than three months' imprisonment. . . ."

In any case, as pointed out by the Court in another portion of its judgment, the " transition period " came to an end on October 15, 1949, and the above provisions were therefore irrelevant.

Treaties—Interpretation of—Bilingual Treaties.

See Case No. 128 (*Re Italian Special Capital Levy Duties*).

iv.—Consideration of Preparatory Work

Treaties—Interpretation of—*Travaux préparatoires*—Parliamentary Discussion—Organs of Interpretation—Judicial Convention between France and the Saar. **Case No. 133**

MINISTÈRE PUBLIC *v.* OLIGER.

Saar, Court of Appeal of Saarbrück (Franco-Sarrois Division). April 13, 1951.

France, Cour de Cassation. November 29, 1951.

THE FACTS.—Oliger, a French national, chief guard at the Administration of Saar Mines, had been sentenced by the Court of first instance at Saarbrück for having caused personal injury to a number of persons. No French member of the public prosecutor's office was present at the hearing. The Procureur Général now appealed to the Franco-Sarrois Division of the Court of Appeal of Saarbrück on the ground that the decision of the Court of first instance had not been rendered in conformity with the Judicial Convention of January 3, 1948, between France and the Saar. Article 26 of that Convention provided for the presence of a French member of the public prosecutor's office in all cases " in which an official of French nationality exercising his functions in the Saar was implicated or injured ". The question before the Court was whether Oliger was an official within the meaning of that provision.

Held (by the Saar Court of Appeal) : that the appeal must be dismissed. The term " official " was not intended to cover persons who did not exercise public authority and were not appointed by the State. The Court said :

" In French law and in Sarrois law the concept ' official ' has a clearly defined and strictly limited meaning. In French law, in particular, the meaning of that term is set forth in laws and regulations which leave no room for extension. Thus the staff of public industrial and commercial establishments, apart from managers and auditors, are governed by the principles of private law and excluded from the scope of the regulations governing the public service.

" However, for all questions submitted to it, the Franco-Sarrois Division of the Court of Appeal of Saarbrück is bound by the provisions of the Judicial Convention of January 3, 1948. That international Convention concluded between France and the Saar created a new jurisdiction, provided for the application of laws, and laid down rules of competence which are particular in character and essentially new. For the purpose of interpreting the term ' official ' as used in that framework the Court cannot resort to definitions given elsewhere in laws and regulations for entirely different purposes. For the purpose of discovering the intention of the authors of the Convention, the preparatory work of which does not appear to have been preserved, it seems essential to refer to the parliamentary discussions which preceded the approval of the Convention by the French Parliament. The exact meaning of the term ' official ' in fact gave rise to a number of interventions in both Houses. Thus, at the sitting of February 27, 1948, a member of the National Assembly insisted on the necessity of giving French nationals who ' represented ' France in the Saar and ' devoted themselves to ensuring the efficient working ' of collieries and factories, all guarantees in the matter of criminal justice, and implicitly gave a definition of the official entitled to enjoy jurisdictional privileges in criminal matters. And at the sitting of March 13, 1948, in the Council of the Republic, the Minister for Foreign Affairs explained these special provisions by reference to the fact that ' the status of the Saar gives officials special rights and obligations in the maintenance of order and the administration of the Franco-Sarrois economic union '. It appears from these declarations that those persons must be regarded as officials in the meaning of the Convention of January 3, 1948, who, by virtue of the presence of French representation in the Saar, are invested with a share of State authority and participate in the maintenance of public order or in the administration of the common economy of the two countries as a result of the economic union between the Saar and France.

" Oliger, by virtue of his functions as chief guard at the Administration of Saar Mines, a public undertaking of an industrial and commercial character, was at the head of some forty employees who were responsible for the supervision and policing of a mine shaft. He was appointed to that post by the management of the Saar Mines. In the accomplishment of his functions he was not invested with any public authority, particularly that of the State. Nor did his functions require him to participate in the maintenance of public order in the Saar, where he could not have been validly given a mission of coercion or required to execute the commands of public authorities. Finally, his functions in no way aided the administration of the Franco-Sarrois economic union. . . ."

On appeal to the French Cour de Cassation,

Held: that the decision of the Saar Court of Appeal must be quashed, and the case sent back for reconsideration. The Court of Appeal was not itself competent to interpret the Judicial Convention of January 3, 1948. The Court said :

" Article 27 of the Convention provides that questions concerning the interpretation of the Convention must be submitted to a mixed commission presided over by the French Minister of Justice. Resolutions of the Commission shall have executory force in France and in the Saar from the time of their publication. The Court of Appeal should thus have reserved decision until the interpretation which it considered necessary had been given by the competent authority."

[Report: *Dalloz hebdomadaire*, 1952, *Jurisprudence*, p. 249.]

Treaties—Interpretation of—Preparatory Work.

See Case No. 118 (*Reservations to the Convention on Genocide*).

Treaties—Interpretation of—Preparatory Work—Negotiations Leading to Treaty—Contract between Ruler and Private Company.

See Case No. 37 (*Petroleum Development Ltd.* v. *Sheikh of Abu Dhabi*).

Treaties—Interpretation of—Preparatory Work—Use of.

See Case No. 129 (*Pertusola Claim*).

Treaties—Interpretation of—Preparatory Work.

See Case No. 128 (*Re Italian Special Capital Levy Duties*).

XIII.—Special Kinds of Treaties

i.—Commercial Treaties. Most-Favoured-Nation Clause

Treaties—Most-Favoured-Nation Treatment—Operation of—Netherlands–Indonesian Union Statute, 1949, as a Treaty—Hague Convention on Civil Procedure, 1905—*Cautio judicatum solvi*. **Case No. 134**

ASIA TRADING CO., LIMITED *v.* BILTIMEX.

Holland, District Court of Amsterdam. October 17, 1951.

THE FACTS.—The Asia Trading Company Limited, of Jacarta (Indonesia), brought an action in the District Court of Amsterdam against the firm of Biltimex, of Amsterdam. The defendant applied for an order that the plaintiff, being a foreign

Case No. 134 *Contd.* company, should deposit *cautio judicatum solvi* (security for costs). The plaintiffs opposed the application.

Held: that the order for the *cautio* must be refused. This followed from Article 24, paras. 1 and 2, of the Netherlands-Indonesian Union Statute agreed upon on November 2, 1949, which promised the subjects of each partner to the Union treatment on a footing of substantial equality with the other's own subjects, and in any case most-favoured-nation treatment. The latter provision guaranteed to Indonesians exemption from the *cautio judicatum solvi*, because the Netherlands had previously exempted other foreigners and foreign companies from the *cautio* under the Hague Convention on Procedure in Civil Cases, of July 17, 1905. The Court further referred to certain diplomatic Notes, exchanged between the Netherlands and the two[1] Indonesian delegations to the Round Table Conference of September-December 1949, stating that for the time being the Union partners would make no difference in respect of procedural rights as between their partner's subjects and their own, and to an explicit answer of the Netherlands Government to Parliament explaining that it had been the very purpose of this Agreement to prevent the exceptional rules obtaining for foreigners in the respective Codes of Civil Procedure from applying between Netherlands subjects and Indonesians.

[Report: *N.J.*, 1952, No. 336.]

Case No. 135 **Treaties—Most-Favoured-Nation Clause—Operation of—Relation of Treaties to Subsequent Municipal Law.**

JONES-DUJARDIN *v.* TOURNANT AND HAUSSY.

France, Tribunal Civil of Arras. February 2, 1951.

THE FACTS.—A French Law of September 1, 1948, gave tenants security of tenure. It provided, however, that in certain circumstances, such as personal need, the owner of premises could evict a tenant. The plaintiffs, British nationals, were the owners of a house of which the second defendant was the tenant. They sought to obtain an order for eviction on the ground that they needed the house for their personal use. It was contended on behalf of the defendant that French nationals only were entitled to the exceptional right of evicting a tenant.

---

[1] There were in fact three parties to the final Agreement reached at the Round Table Conference, *viz.* the Kingdom of the Netherlands and, on the Indonesian side, the Government of the Republic of Indonesia and the Federal Consultative Assembly (representing the rest of Indonesia). See *International Law Reports*, 1950, p. 200, n. 1.

Held: that the plaintiffs were entitled to recover possession of the house owned by them. The Court said:

"The Anglo-French Convention concerning commercial and maritime relations, of February 28, 1882, contains a most-favoured-nation clause. An Agreement promulgated by Decree dated June 16, 1933, extended the scope of that Convention to leases. It is not necessary, in order to enable a British subject to rely on the provisions of the Law of September 1, 1948, which give special rights to French nationals, that English law should contain analogous provisions, since the Constitution of 1946 affirms the supremacy of treaties over municipal law, even if that law is later in date than the treaty."

[Report: *Dalloz hebdomadaire*, 1951, *Jurisprudence*, p. 360.]

NOTE.—See also *Dreyfus* v. *Nadoretsky, commonly called Norris* (*ibid.*, p. 390), decided by the Tribunal Civil de la Seine on March 5, 1951, where it was *held* that the Swiss nationality of the plaintiff did not constitute an obstacle to his recovering possession of an apartment in pursuance of the Law of September 1, 1948.

See, on the other hand, *Baque* v. *Agusty* (*Sirey*, *Jurisprudence*, 1952, I, p. 129), decided by the Cour de Cassation on August 2, 1951, where it was *held* that the appellant, a Spanish national, was not entitled to invoke Article 61 of the Ordinance of October 17, 1945, concerning the protection of rural tenants, on the ground that the most-favoured-nation clause contained in the Franco-Spanish Consular Convention of 1862 did not cover rural leases.

ii.—Peace Treaties

Treaties—Interpretation of—Peace Treaty of Paris, 1947—Meaning of "charges of any kind"—Whether Italian Legislation concerning Tenancies Enacted during Armistice Period Satisfies Obligation to Restore Property—Whether Letting of Premises by Sequestrator "a measure taken against property". **Case No. 136**

OTTOZ CLAIM.

Franco-Italian Conciliation Commission.
(Bolla, Perier de Feral, Sorrentino.)
September 18, 1950.

THE FACTS.—In 1938 the claimants, French nationals, let their villa in Courmayeur (Italy) to one Poma on a tenancy from year to year (which was to be suspended "in the event of a war involving Italy"). In 1943 the villa and an adjoining house under construction were sequestrated, and in 1944 the sequestrator entered into a new lease with Poma, on similar terms to the former agreement. The sequestrator also granted to Poma a lease of the house under construction. In 1946 the sequestration was annulled. In 1947 the claimants sought to obtain possession of their properties, and in 1948 the local Controller of Finance, on behalf of the claimants, commenced proceedings for the recovery of the premises. In his defence, Poma pleaded that the villa had been let to him by the claimants before the war, that his tenancy had been extended by Italian legislation, and that the lease of the house under construction was merely complementary to that of the villa. In 1949 an Italian court made an order for possession of the house under construction, but not of the villa. An appeal by the Controller against this order was pending in the Court of Appeal of Turin while the present claim was before the Commission, to whom it had been submitted by the French Government on behalf of the claimant.

On behalf of the Italian Government, it was contended that under the Treaty of Peace the French Government was not entitled to claim the restoration of a given property ; it could only ask for a declaration that Italy was under an international obligation to restore the property. In this case, there was no such obligation. The Treaty of Peace did not oblige the Italian Government to cancel leases granted by sequestrators. The word " charges " used in Article 78 [1] of the Treaty refers only to charges *in rem*. The authors of the Treaty did not have to concern themselves with such leases once the Italian Government, during the armistice period, had introduced legislation which resulted in their cancellation. Alternatively, if the Treaty had imposed such an obligation on the Italian Government, the latter had discharged it by enacting the Laws referred to. It was then for persons interested to apply to the Italian courts for the application of those Laws. In the further alternative, Article 78 (2) of the Treaty could not apply to leases renewed by a sequestrator, as the lease of the villa in this case had been renewed.

On behalf of the French Government, it was contended that the provisions of Article 78 of the Peace Treaty had the character of provisions of international law which created, in favour of United Nations nationals, subjective rights not only to the restoration *in integrum* of their property in Italy, under the conditions laid down in paragraphs 2 and 3 of that Article, but also to compensation for loss and damage suffered as a result of the war or of special measures taken concerning that property. They implied that Italy should cancel tenancy agreements entered into by sequestrators affecting property of United Nations nationals. The Italian Government would have satisfied the requirements of Article 78 (2) if it had passed a law invalidating leases granted by sequestrators, but it had not done so. The Laws cited by the Italian Government were passed before the Treaty came into force, and in any event had done no more than to provide that the leases granted by sequestrators would, at the option of the owners, come to an end or remain in force on the restitution of the property. That being so, an international tribunal must maintain the superiority of the Treaty over the Law. Although they had sought to take advantage of the Italian Law, the claimants had not lost their right to a strict application of the Peace Treaty. It was true that the Commission could deal only with disputes between States, but Governments act in the interests of, and to ensure respect for the rights of, their nationals. It was almost entirely on the procedural plane that the dispute remained strictly one between States. In essence, the Commission, especially when it was dealing with a case involving the application of Article 78, had to admit or deny the existence not only of an obligation of the Italian State but also of a subjective right of a United Nations national. Although it was a conciliation commission, it was really an arbitral body, whose decisions had the force of *res judicata* and were binding on each of the States parties to the dispute, not only as an international obligation of a more or less abstract and general nature, but also as the declaration of the existence of a subjective right of an individual. The unsuccessful defendant Government must give concrete effect to the arbitral award by restoring his property to the individual. In this case the Commission must declare that the claimants had the right to be reinstated into the enjoyment of their property. The Italian Government could take refuge behind neither its internal laws nor its constitutional powers to refuse to carry out the award. It must pass laws which would enable it to do legally that which was right.

---

[1] See *supra*, p. 424, n. 1.

Held (by a majority) : that the claim must succeed. The Italian Government must ensure, by such means as it deemed fit, the restoration to the claimants of their property at Courmayeur.

The Commission affirmed its findings in the *Guillemot-Jacquemin Claim* (Case No. 127, *supra*) : (i) that both paragraph 1 and paragraph 2 of Article 78 presupposed that property, rights and interests therein mentioned had been the object of some measure (*e.g.* a sequestration) by the Italian Government which had the effect of depriving the owner, partially or wholly, of his freedom of disposing, *de jure* or *de facto*, of them ; and (ii) that the " charges of any kind " from which the Italian Government had to release the property, rights and interests which were to be restored, did not extend to the consequences of general legislative measures affecting all property, including Italian property. The Commission continued :

" It cannot be doubted that the sequestration in 1943 of [the claimant's] property at Courmayeur is one of the measures

Case No. 136 *Contd.*

which requires the ' restoration ' [*rétablissement*] mentioned in paragraph 1 of Article 78 of the Treaty of Peace and that [*restitution*] mentioned in paragraph 2 of the same Article. In so far as a lease granted by a sequestrator stands in the way of such a *rétablissement* or a *restitution*, the Italian Government is bound under paragraph 2 to nullify it, otherwise the properties would not be restored free of ' all encumbrances and charges of any kind to which they may have become subject as a result of the war '."

The Commission could not follow the argument that the Italian laws relating to tenancies granted by sequestrators, passed during the armistice period, satisfied the requirement of the Allied and Associated Powers and fixed the limits of the international obligation of Italy under the Treaty. " Article 78 (1) of the Treaty of Peace recalls, it is true, that Italy has already taken certain measures to restore the legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and to return to those United Nations and to their nationals their property in Italy. But the Treaty of Peace does not consider these measures by any means sufficient, otherwise it would merely have mentioned them and have imposed on the Italian Government the obligation of not repealing or modifying the Laws in question. On the contrary, the Treaty of Peace imposes on the Italian Government a duty of *restitutio in integrum*, the limits of which it defines clearly, and it treats the measures previously taken by the Italian Government as no more than a fact which, if necessary, could constitute a partial anticipatory execution of the international obligation referred to.

" Both in matters of procedure and in regard to the merits of their claims, the right of United Nations nationals to obtain the restitution of their property and to be restored in their rights and interests, flows directly from the Treaty of Peace of Paris and cannot be limited by Italian legislation passed during the armistice. It follows that declarations made before the conclusion of the Treaty of Peace by the claimants with regard to the method by which they proposed to exercise their rights flowing from Italian legislation passed during the period of the armistice, cannot be set up against the demand made by the French Government, based on the Treaty of Peace, that the property situate at Courmayeur be restored to the claimants.

" The same applies to the legal proceedings commenced by the Controller of Finance, at the instance of the claimants, . . . against Poma. These could be relied on in the present proceedings by the Italian Government against the French Government only if they had resulted in the restitution which is the object of the international obligation placed by paragraphs 1 and 2 of Article 78 of the Treaty of Peace on Italy ; and that is by no means the case. In so far as it appears to the

French Government that the Italian Government has not satisfied that obligation, it is in order in submitting the dispute to the Commission of Conciliation set up by the Treaty of Peace. The Commission cannot allow itself to be halted by the circumstance that a dispute is pending before an Italian court, since that dispute is not one between the two Governments, although it is between one of the Governments acting on behalf of the private individuals on whose behalf that Government appears in the present proceedings, and other private individuals ; and since that dispute affects not the international obligation prescribed in paragraphs 1 and 2 of Article 78 of the Treaty of Peace, but the rights conferred during the armistice by the internal Italian legislation on a party who is a French national. . . . The obligation resulting from paragraphs 1 and 2 of Article 78 of the Treaty of Peace could only be said to be discharged if both the villa and the house under construction at Courmayeur had been restored to the claimants. But the [court] had ordered the restitution of the house under construction only. Moreover, not only has the order not yet been carried out, it has not yet acquired the force of *res judicata*."

With regard to the contention made on behalf of the Italian Government (citing the Commission's ruling in the *Guillemot-Jacquemin Claim, supra*, Case No. 127) that the letting of the villa was not " a measure taken by the Italian Government against the property ", the Commission distinguished the former case and the present on two grounds : (i) in the former case the claimant had, by her agent, agreed to the lettings after the declaration of war in 1940, while in the present case the claimants had let the villa to Poma well before that date, with a stipulation that the lease should determine if Italy entered the war ; and (ii) in the former case the original tenancies were from time to time renewed by the agent and the sequestrator respectively, while in the present case the administrator had granted new leases to Poma.

[Report : *Recueil des Décisions*, Part 3, p. 22.]

NOTE.—The Italian member of the Commission appended to the Judgment a dissenting opinion dated December 15, 1950.

Treaties—Peace Treaties—Operation of—Interpretation of—Restoration " free of encumbrances "—Whether Applying to Rent Restriction Legislation. **Case No. 137**

In *Sonnino* v. *Cambise* the Italian Court of Cassation *held* on March 2, 1951, that the stipulation in Article 78 of the Treaty of Peace with Italy, 1947, that all items of property of the United Nations or of United Nations nationals which had been requisitioned, confiscated or otherwise detained should be restored " free of all encumbrances and charges of any kind to

Case No. 137 Contd. which they may have become subject as a result of the war ", was not to be construed as referring to limitations arising out of rent restriction legislation (*Mass. Foro italiano*, 1951, p. 123).

Treaties—Peace Treaties—Operation of—Interpretation of Order Based on Treaty but Differently Phrased—Powers of Administrator of Hungarian Property—Whether Company's Property Deemed to " Belong " to Shareholders.

See Case No. 40 (*Bank voor Handel en Scheepvaart N.V.* v. *Slatford*).

PART IX

INTERNATIONAL ORGANIZATION AND ADMINISTRATION

A—INTERNATIONAL ORGANIZATION IN GENERAL

International Organization—In General—Continuity of International Organizations—Substantial Identity of the Bodies Concerned—Succession to Rights—Pan-American Union—Effect of Charter of the Organization of American States, 1948—Replacement of Union of American Republics by Organization of American States—Right of Pan-American Union to Receive Bequest. **Case No. 138**

PAN-AMERICAN UNION *v.* AMERICAN SECURITY AND TRUST COMPANY.

United States, District Court for the District of Columbia. May 6, 1952.

THE FACTS.—Under a will executed on April 27, 1943, the Pan-American Union was named as the residuary legatee of the estate of Dr. Leo S. Rowe, then the Director-General of the Union. Dr. Rowe died on December 5, 1946. In 1948, by the Charter of the Organization of American States, certain functions and powers were conferred on the Pan-American Union which was given the additional designation of General Secretariat of the Organization of American States. The character of the Pan-American Union and the changes in its status are described in the Complaint filed by the plaintiff. It is convenient to set out in full the relevant parts of the Complaint:

" The predecessor of the Pan American Union was created at the First International Conference of American States held in Washington, D.C., in 1889–1890. It was officially named the ' Commercial Bureau of the American Republics '. At the same conference, an association was formed under the title of ' The International Union of American Republics ', to be represented by the said Bureau. At the Second International Conference of American States, held in 1901–1902, The Commercial Bureau of the American Republics was placed under the management of a Governing board, consisting of the Secretary of State of the United States of America, as its Chairman, and the diplomatic representatives of the various American Governments accredited to the Government of the United States. This Union was maintained and confirmed by the Third, Fourth and Fifth International Conferences

Case No. 138 *Contd.* of American States held in 1906, 1910 and 1923, respectively. However, in 1910, the name of the Commercial Bureau of the American Republics was changed to Pan American Union, and the International Union of American Republics was changed to ' Union of American Republics '.

" The Pan American Union continued the functions of the former Bureau as agent of the Union of American Republics, and in 1923 the Pan American Union was officially made the permanent organ and administrative agent of the twenty-one republics of the Union.

" At all the five conferences mentioned above and at subsequent conferences in 1928, 1933 and 1938, the member governments of the Union of American Republics improved and strengthened their organization and assigned new functions and broader powers, progressively, to the Pan American Union.

" At the Conference of American States held at Mexico City in 1945, it was recognized that the time had come to give a more definite legal status to the inter-American regional organization, more particularly in view of the new organization of United Nations which it was proposed to establish as successor to the League of Nations. In consequence, the Conference adopted a resolution providing for the preparation of a charter to that effect.

" Accordingly, three years later, in 1948, at Bogotá, Colombia, the representatives of the twenty-one participating American Governments signed a document entitled ' Charter of the Organization of American States '.

" Under the Charter, the Organization of American States succeeded to the former Union of American Republics. The functions and powers of the Pan American Union were given greater importance and wider range, and it was given the additional designation of General Secretariat of the Organization of American States.

" At the Bogotá Conference, the Charter was provisionally adopted, but required the ratification of fourteen of the twenty-one participating governments before it could be fully and permanently binding on members of the Organization. On August 28, 1950, the United States Senate gave its advice and consent to the Charter as a treaty, and on June 19, 1951, the ratification of the United States of America was deposited in the Pan American Union. On December 13, 1951, the Government of Colombia was the fourteenth to deposit its ratification, and accordingly on that date, a public ceremony was held to celebrate the entry into full force and effect of the Charter of the Organization of American States. On December 27, 1951, the treaty was proclaimed by the President of the United States.

" Prior to the Bogotá Conference of 1948, the Pan American Union was controlled by a Governing Board. It was composed of one member from each of the twenty-one governments participating in the Union of American Republics. After the Bogotá Conference and the adoption of the Charter of the Organization of American States, the former Governing Board was succeeded by the Council of the Organization of American States. The Council, like the Governing Board, was composed of one representative of each member state.

" To the Council were assigned duties corresponding generally to those of the former Governing Board of the Pan American Union, together with additional duties appropriate to the new character and functions of the Organization of American States. Thus, the Council became responsible for the proper discharge by the Pan American Union of the duties assigned to it by the Charter. It was provided in the Charter that the Council should elect annually a Chairman, whose duties correspond substantially to those of the former Chairman of the Governing Board of the Pan American Union.

" The Charter of the Organization of American States made no change in the name of the Pan American Union. There is nothing in the Charter to indicate any alteration of the identity of the Pan American Union. The Pan American Union continues to exercise substantially the same functions after the adoption of the Charter as before. The man who was formerly entitled Director General of the Pan American Union has assumed the title of Secretary General of the Organization of American States, and as such he is the legal representative of the Pan American Union (Article 80, Charter O.A.S.).

" The Pan American Union, as General Secretariat of the Organization of American States, has succeeded to the property and contractual rights it previously held as agent of the Union of American Republics. The Council of the Organization of American States succeeded to the legal powers formerly exercised by the Governing Board of the Pan American Union. The Chairman of the Council now signs documents which would formerly have been signed by the Chairman of the Governing Board. The Secretary General of the Organization of American States has succeeded to the position formerly designated Director General of the Pan American Union."

In 1951 the American Security and Trust Company, as executor of the will of Dr. Rowe, completed the administration of the estate, but declined to deliver to the Pan American Union its bequest under the will unless it could be established that the present Pan American Union, as reorganized in 1948, was the legal successor to the Pan American Union as it existed at the time of Dr. Rowe's death.

Held: " that the Pan American Union were entitled to receive the residue of the estate of Dr. Rowe ; that the Council of the Organisation of American States is in fact and at law the successor to the Governing Board of the Pan American Union, and that the Secretary General of the Organisation of American States, in his capacity as Director of the Pan American Union, is in fact and at law the successor to the former Director General of the Pan American Union ; that the Secretary General of the Organisation of American States, as legal representative of the Pan American Union, is authorized to sign or to appoint a representative to sign for him, a receipt on behalf of the Pan American Union for the undistributed part of the residue of the estate of Leo S. Rowe, at such times as the defendant complies with the exigencies of this judgment."

[Report : *Inter-American Juridical Yearbook*, 1950–1951, p. 147.]

C—SPECIALIZED AGENCIES OF THE UNITED NATIONS

Case No. 139 **International Administration—Specialized Agencies of the United Nations—Status and Immunities of—Specialized Agency Operating in Occupied Territory—Whether Entitled to Same Immunities as in Territory of Occupant—Legal Position of International Refugee Organization in Occupied Germany.**

SCHAFFNER *v.* INTERNATIONAL REFUGEE ORGANIZATION.

Germany (*United States Zone of Occupation*), *United States Court of Appeals. August* 3, 1951.

THE FACTS.—The plaintiff (the appellant herein) instituted proceedings for damages for personal injuries sustained by reason of the negligent driving of a motor vehicle by a driver of the International Refugee Organization (IRO) in that part of Germany which was occupied by the United States. The IRO claimed immunity from suit and contended that the International Organizations Immunities Act, an American Statute which, *inter alia*, granted immunity from suit in American courts to specialized agencies, including the IRO, applied equally in the United States Zone of Germany.

Held: that the International Organizations Immunities Act applied only within the territory of the United States, but that the United States High Commissioner for Germany, in the exercise of governmental functions on behalf of the United States, had granted immunity from suit to the IRO, and that for that reason the latter was immune from suit in the United States courts of the Allied High Commission for Germany.[1] The Court said :

" The only question before this court is whether or not the International Refugee Organization is immune from suit in the United States Courts of the Allied High Commission for Germany. There were, however, other questions raised in this matter which should be considered and the first question was whether or not the ' Privileges and Immunities of International Organizations Act '[2] passed by the Congress of the United States is applicable to the United States Area of Control in Germany. The second question is whether or not the agreement made and entered into between IRO and the U.S. Commander-in-Chief, EUCOM, dated 28 July 1948, grants immunity from suit to the IRO. Since the argument of this case, the United

---

[1] See also *Allgemeine Ortskrankenkasse Bremen* v. *International Refugee Organization* (1951/52), XIII, C.A.R. (U.S.), 260.

[2] 22 USCA, Sec. 288.

States High Commissioner for Germany had injected a third consideration by reason of a telegram received 5 February 1951, wherein the High Commissioner stated that it is his policy that IRO shall enjoy immunity from civil suit in the United States Area of Control except in so far as in any particular case IRO may expressly waive its immunity. As to the first question there can be no other conclusion than that the Immunity Act does not apply in Germany. We have heretofore determined [1] that the Occupied Zone of Germany is neither physically nor legally a part of the United States, and that, therefore, neither the United States constitution nor the laws of the United States can be extended to this occupied zone, unless such zone be incorporated into the United States. We, therefore, must hold that the Immunities Act does not apply to the IRO in the United States Occupied Zone in Germany.

" On the second question we must first consider Article 13 of the IRO constitution which is entitled ' Status, Immunities and Privileges ' and reads in part as follows :

> ' 2. (*a*) The Organization shall enjoy in the territory of each of its members such privileges and immunities as may be necessary for the exercise of its functions and the fulfilment of its objectives.
>
> ' 3. Such legal status, privileges and immunities shall be defined in an agreement to be prepared by the Organization after consultation with the Secretary-General of the United Nations. The agreement shall be open to accession by all members and shall continue in force as between the Organization and every member which accedes to the agreement.'

" Article 15 of the Constitution states that the relationship of IRO with the authorities of countries of location of refugees and displaced persons ' shall be determined by agreements to be negotiated by it with such Governments or administrations in accordance with the terms of this Constitution '. An agreement was made and entered into between IRO and the U.S. Commander-in-Chief, EUCOM, on 28 July 1948 and the only clause in this agreement which relates to immunity is Sec. 8, Par. 12a, which reads as follows :

> ' IRO personnel are subject to Military Government Law and Courts for offenses committed by them in the U.S. Area of Control. IRO and IRO personnel shall have in general the same privileges and immunities as civilian employees of the occupation forces who are in the same status.'

" This defines the status of immunity from suit and since civilian employees of the Occupation Forces are not immune from the particular type of suit herein involved, therefore, this provision of the agreement does not afford IRO immunity from suit.

---

[1] *United States Military Government* v. *Ybarbo*, 1 C.A.R. (U.S.) 207; *Annual Digest*, 1949, Case No. 160.

Case No. 139 *Contd.*

" We now pass to the third question raised by the telegram issued by the United States High Commissioner on 15 February 1951. This telegram reads as follows :

' This cable is intended to set forth the policy of the United States High Commissioner concerning the liability of the IRO to civil suit in the United States area of Control. It is understood, in this connection, that a case involving this question is now pending before the United States Courts of the Allied High Commission. It is the policy of the United States High Commissioner that the IRO shall enjoy in the area of control immunity from civil suit, except insofar as in any particular case it may expressly waive its immunity. Any such waiver, if given, shall extend to measures of execution only if the waiver specifically so provides. It should be observed that this statement of policy applied only to the IRO and not to individuals associated with that organization. The privileges and immunities of such persons are governed by the agreement of 28 July 1948 between the IRO and the Commander-in-Chief, EUCOM, on the subject of the operation of the IRO in the United States area of control in Germany. McCloy.'

" When Mr. McCloy was appointed United States High Commissioner for Germany, Executive Order No. 1.062, issued 6 June 1949, provided that the United States High Commissioner should ' exercise all of the governmental functions of the United States in Germany (other than the command of troops) '. Under this authority, the High Commissioner is not only the executive but also the legislative authority for the United States Zone of Germany. As the highest executive authority in Germany, it is within his power to announce the policy of his government here in Germany as to whether or not an international organization, such as the International Refugee Organization, shall or shall not be immune from suit in the United States Zone of Germany.

" The High Commissioner, as the highest executive power in the United States Zone of Germany, is the official to determine what the relationship shall be between the High Commissioner's government in Germany and an agency of a foreign government operating in the United States Zone of Germany. The High Commissioner has made his determination and has stated that it is his policy that the International Refugee Organization shall enjoy immunity from civil suit in the United States Area of Control in Germany. Since he has established immunity for the International Refugee Organization, this Court should recognize such immunity."

[Report : (1951), XII, C.A.R. (U.S.) 391.]

NOTE.—This decision is also reported in *A.J.*, 46 (1952), p. 575.

D—OTHER INTERNATIONAL ORGANIZATIONS AND ORGANS OF INTERNATIONAL ADMINISTRATION

International Organizations—Legal Personality of the International Refugee Organization—Capacity to Institute Legal Proceedings in a National Court—Liberal Interpretation of Privileges and Immunities Granted to International Organization by National Statute—Whether an International Organization Created by a Treaty to Which the United States Is a Party May *ipso facto* Invoke the Jurisdiction of United States Courts. **Case No. 140**

INTERNATIONAL REFUGEE ORGANIZATION *v.* REPUBLIC S.S. CORP. *ET AL.*

United States, Court of Appeals, Fourth Circuit.
May 11, 1951.

THE FACTS.—The International Refugee Organization sued the Republic Steamship Company and its president for fraud. The action was dismissed by the lower Court for lack of jurisdiction, on grounds stated in the *Held* below. On appeal,

Held: that the dismissal must be reversed and the case remanded for consideration on the merits. The Court said:

" The dismissal for lack of jurisdiction in No. 6202 is based upon the holding that a suit by the I.R.O. is not one of which the federal courts have been given jurisdiction. We think that this is error. The United Nations is an international organization of which the United States is a member, and article 104 of its charter provides that it shall enjoy in the territory of each of its members ' such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes '. 59 Stat. 1053. Article 13 of the Constitution of the I.R.O., which is an agency of the United Nations, contains a provision to like effect. In the International Organization Immunities Act, 59 Stat. 669, 22 U.S.C.A. § 288a, Congress has undertaken to discharge the obligations assumed under these provisions by providing that international organizations such as I.R.O. shall ' to the extent consistent with the instrument creating them, possess the capacity—

' (i) to contract;

' (ii) to acquire and dispose of real and personal property;

' (iii) *to institute legal proceedings* '. (Italics supplied). This means, by necessary implication, that Congress has opened the doors of the federal courts to suits by such international organizations; for the right to institute legal proceedings

Case No. 140 *Contd.*

means the right to go into court, and the federal courts are the only courts whose doors Congress can open.

" As pointed out by the Secretary of State (hearings on U.N. Charter, 77th Congress, 1st Session, pp. 33, 134–135) and the Senate Committee on Foreign Affairs (S. Report, exec. No. 8, 77th Congress, 1st Session, p. 6), ' It is apparent that an organization like the United Nations which will have offices and employees, will purchase supplies, and presumably rent or purchase office space, must have the legal capacity to enter into contracts, to take title to real and personal property and to appear in court (although its position as a defendant is protected by Article 105). The purpose of Article 104 is to make clear that the Organization has that legal capacity.' Certainly an organization like the I.R.O., which is purchasing and chartering vessels and entering into all sorts of contracts in connection with the transportation of refugees, must have the right to go into court for the protection of its rights and interests ; and in this country the logical courts for it to go into are the courts of the nation which has adhered to the international organization, not the local courts of the several states which have had no part therein. In determining its rights in this regard, we should give a liberal interpretation to the International Organization Immunities Act. As was well said by Judge Goodman in *Balfour, Guthrie & Co.* v. *United States*, D. C., 90 F. Supp. 831, 833 : ' The broad purpose of the International Organizations Immunities Act was to vitalize the status of international organizations of which the United States is a member and to facilitate their activities. A liberal interpretation of the Act is in harmony with this purpose.'

" We think also that there is jurisdiction to entertain the suit by reason of 28 U.S.C.A. § 1331, which provides that the District Courts shall have jurisdiction of civil actions arising under the ' Constitution, laws or treaties of the United States '. Under the principles laid down in *Osborne* v. *United States Bank*, 9 Wheat. 738, 6 L. Ed. 204, this was certainly a civil action arising not only under the treaties creating the United Nations and the International Refugee Organization into both of which the United States had entered, but also under the act of Congress which gives the right to sue to public international organizations in which the United States participates. The right of federal corporations to invoke the jurisdiction of the federal courts has been curtailed by act of Congress but this involves no limitation of the doctrine of *Osborne* v. *United States Bank, supra*. On the contrary, it is an express recognition of that doctrine. It will be noted that the statute, 28 U.S.C.A. § 1349, denying jurisdiction to a corporation created by act of Congress unless the United States is the owner of more than one-half its capital stock can have no application because the I.R.O. is not a corporation created by act of Congress but an international organization to which the United States itself is a party. If, as said by the Supreme Court in the case of *Gully* v. *First National Bank*, 299 U.S. 109, 114, 57 S.Ct. 96, 81 L. Ed. 70, there is no thought of disturbing the doctrine of the charter cases, that doctrine must be held to support the jurisdiction here. If a corporation may invoke the federal jurisdiction because created by a law of the United States, an international organization created by treaties to which the United States is a party may invoke the jurisdiction because created by a treaty of the United States. Especially is this true where the international organization is clothed by a law of the United States with the essential corporate functions of contracting, acquiring and disposing of property and suing in court.

"It has been suggested that the jurisdiction of the court can be sustained under 28 U.S.C.A. § 1345 on the theory that a suit by an international organization is a suit by the United States as well as by the other nations which are parties to the organization and that jurisdiction of a suit by the United States is not defeated because other parties are joined as plaintiffs in the suit. See *Erickson* v. *United States*, 264 U.S. 246, 249, 44 S.Ct. 310, 68 L. Ed. 661. We need not pass upon this, however, as we think there can be no question as to the jurisdiction for the reasons already given."

[Reports: 189 F. 2d 858 (1951); 92 F. Supp. 674 (1950).]

NOTE.—The case is discussed in *George Washington Law Review*, 20 (1952), p. 489.

See, with further respect to the immunity of the I.R.O., *Schaffner* v. *International Refugee Organization* (Case No. 139 in this volume).

Reference may also be made to an attempt, in a somewhat lighter vein, to invoke as self-executory certain provisions of the Charter. In *Dossett* v. *State*, decided by the Supreme Court of Mississippi on May 14, 1951, the appellant was convicted of the unlawful possession of intoxicating liquor. He argued, *inter alia*, that the States composing the United States of America no longer possessed any police power to regulate the possession of liquor, contending that this power had been taken from the States and vested exclusively in the United Nations by its Charter. It was held that this contention must be rejected. The Court said:

". . . Appellant cites particularly Chapters IX and X of the Charter as supporting his views, but when these are examined it is at once seen that they only authorize the creation of The Economic and Social Council with authority to initiate studies and make recommendations with respect to international economic, social, cultural, educational, health and related matters. The United Nations is granted no authority to take over our schools and institutions of learning, nor our health departments and other agencies for the promotion of the several objects mentioned. It is only authorized to make recommendations and undertake to promote these

Case No. 140 *Contd.* objects between the nations and purely from an international aspect. There was never any intention that the United Nations should interfere in any manner with domestic police powers, and this is made clear by Chapter I, Article 2, Paragraph 7 of its Charter, which provides in part ' Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter '.

" Nowhere in the Charter of the United Nations are we able to find one single reference to the subject of intoxicating liquors, and after a careful study of that document we conclude that there is no shadow of merit in appellant's contention." [Report : 52 So. 2d 490.]

E—INTERNATIONAL OFFICIALS

Case No. 141 **International Organizations—Officials of—United Nations—Contracts of Employment—Termination of—Discretionary Powers of Secretary-General—Limits of.**

AUBERT *ET AL. v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. June 30, 1950.

THE FACTS.—The fourteen complainants were employed as verbatim reporters in the Secretariat of the United Nations. As a result of the reorganization of the conference services of the United Nations, which involved the increased use of summary records prepared by *précis*-writers and the use of sound recording and transcription equipment for the preparation of verbatim reports, the services of the complainants became redundant. The Secretary-General terminated their appointment upon the abolition of their post. The complainants appealed against this decision on three main grounds. First, having regard to the provisions of the Staff Regulations and the approved budget for the financial year 1950, the Secretary-General did not have the power to effect the abolition of their posts. Secondly, they contended that the abolition of posts and the creation of a new category of posts were steps in a manœuvre motivated not by the necessities of the service, but by a desire to terminate the services of certain individual officials. Thirdly, they maintained that the Secretary-General had violated a specific clause of the contracts of employment of the complainants in that he varied without their consent the duties for which they had been recruited and which formed the basis of their contracts.

Held: (*a*) that the Secretary-General had power to abolish posts, that the fictitious substitution of one class of posts for another was not established, and that the Secretary-General had the right to vary the duties of officials under contract; and (*b*) that the Secretary-General violated the rules governing termination of appointments in that he gave notice of termination before fully examining the possibilities of transferring the complainants to other posts for which they might be suited; that the notices of termination were invalid; and that the contracts of the complainants were still in force, without derogation to the right of the Secretary-General at a later date to give to individual officials notice of termination on grounds of abolition or reduction of post, after full examination of the possibilities of transferring such individuals to any other suitable post.

The Tribunal said: ". . . [The Tribunal] holds that the Administration must have authority to make any reductions in posts, including abolition of posts, which may be necessary in order to observe due economy while providing adequately for the service of the United Nations; and that that power cannot in any way be regarded as affected by provisions of the budget which must be regarded as conferring authority but not imposing an obligation to spend the whole of the credit provided in the budget. . . . While accepting the view that it would be a misuse of power to effect a fictitious substitution of one class of posts for another with the sole object of affecting the position of individual officers [the Tribunal] is not satisfied that is in any way a true representation of what has taken place in the present instance. . . . [The Tribunal] cannot accept the implicit contention of the Applicants that the Administration can in no circumstances vary the duties of officials under contract. On the contrary, it is implicit in the terms of Staff Rule [then 104] . . . that it is right and proper for the Administration, where individual officials are affected by reduction or abolition of posts to propose the transfer of such officials to other duties as an alternative to the termination of their contracts."

[Unreported.]

NOTE.—The Staff Association of the United Nations submitted an application for intervention in this case. While the Tribunal considered that its decision was likely to affect the interest which all officials have in the observance by the Administration of the terms of contracts of employment and Staff Regulations, it rejected the application on the grounds (*a*) that the contractual rights of each individual official holding a permanent appointment could not directly be affected by the decision, and (*b*) that the Staff Association could not be regarded as an official or a person, and that the Tribunal, therefore, had no jurisdiction under the terms of its Statute. [June 29, 1950. Unreported.]

Case No. 142 **International Organizations—Officials of—United Nations—Contracts of Employment—Fixed-Term Appointments—Termination of—Powers of Secretary-General—Limits of Discretion—Obligation to Give Reasons for Decision.**

HOWRANI *ET AL.* *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations.
August 25, 1951.

THE FACTS.—This decision deals with the legal issues respecting two points common to the complaints of five former officials of the United Nations, namely, the powers of the Secretary-General in connection with the termination of temporary-indefinite contracts and the non-renewal of fixed-term contracts, and secondly, the obligation of the Secretary-General, if any, to provide reasons in making such decisions. Three types of contracts were in use in the United Nations: (*a*) indeterminate contracts, valid without limit of time, and subject to review every five years. Such contracts could be terminated for a limited number of reasons, including incompetence, abolition of post or impairment of health; (*b*) temporary indefinite contracts, valid without limit of time but subject to termination at any time with 30 days' notice; (*c*) fixed-term contracts valid for a specified period of time. In 1947 the General Assembly, in order to give the Secretary-General greater freedom of action in improving the quality of the staff and its recruitment on a wide geographical basis, amended the provision of the Staff Regulations governing the termination of temporary-indefinite contracts by deleting the specified causes for termination, which were the same as those applying to indeterminate contracts. The Secretary-General was granted the power to determine the conditions to which temporary contracts should be subject. The temporary-indefinite contracts of four complainants (Howrani, Keeney, Picou, Kehoe) were terminated and the fixed-term contract of the fifth (Alper) was not renewed. Grounds for such action were indicated only in very general terms, *e.g.*, in the case of Howrani the termination was recommended because the need to develop the services performed by the Bureau of the Press and Publications, including the services in Arabic, made it desirable to place in his post a person better suited to these particular responsibilities. The complainants alleged improper termination of their contracts of employment. The Secretary-General contended that, as a result of the 1947 decision of the General Assembly, he had the right to terminate temporary contracts "without showing cause".

Held: (1) *As to the Secretary-General's power to terminate temporary appointments*—that the General Assembly of the United Nations did not intend to give, and did not give, to the Secretary-General an absolutely discretionary power in respect of termination of temporary appointments. The Tribunal said: ". . . for purposes of clarity, the Tribunal would like to point out that the so-called temporary-indefinite contract utilised by the United Nations is *sui generis.* It has no counterpart in the contractual arrangements of the specialised organisations, and is not encountered in the field of administrative law generally. The amorphous relationship which this contract establishes is rather more closely akin to the status relationship of a national civil servant employed under a 'statut général des fonctionnaires' or 'civil service law' than to a contractual relationship recognisable at public law. . . . The fact that in consequence of the clarifying amendments introduced into the staff regulations in 1947, the Secretary-General is no longer limited in his power to terminate temporary contracts by the restrictive provisions of Regulation 21 (and rule 102), does not imply by itself that the Secretary-General is empowered to terminate temporary contracts for any reason he might consider proper to apply in any given case, whatever that reason might be, or simply for no reason at all. . . . It must be concluded that the General Assembly, when it waived the restrictions imposed by Regulation 21 (Staff Rule 102) in the case of the termination of temporary contracts, did not intend to give, and did not give, to the Secretary-General an absolutely discretionary power in respect of terminations. . . . The General Assembly conferred upon the Secretary-General the power to determine 'conditions' to which temporary contracts should be subject, making thus absolutely clear its will that temporary contracts and their termination must be subject to certain conditions which it permitted the Secretary-General to elaborate. . . . The fact that the Secretary-General has not, to date, considered it appropriate to determine the 'conditions' . . . to which temporary contracts of the type before the Tribunal are to be subject, either in the staff rules or in individual letters of appointment of the applicants, does not deprive the holders of temporary contracts, in the opinion of the Tribunal, of the rights and guarantees to which they are entitled as members of the International Civil Service of the United Nations, among the more essential of which are the right to appear before the Appeals Board and the right to be heard before this Tribunal. . . ."

(2) *On the right of the Secretary-General to withhold the reasons for termination*—that the Secretary-General was not entitled to withhold the specific reasons for the termination of a temporary appointment. The Tribunal said: ". . . staff members holding temporary contracts of the type involved

Case No. 142 *Contd.*

. . . have a right to the guarantees afforded to the members of the staff by the regulations and rules concerning the Joint Appeals Board and the Administrative Tribunal . . . it is clear that the contention . . . that the Secretary-General ' under staff regulations and the staff rules in force, is under no obligation to specify the reasons for terminating staff ', is of such a nature that, if it were accepted by the Tribunal, it would bring about the frustration of the proceedings before the Appeals Board and this Tribunal would amount to the outright nullification of the guarantees established in favour of the members of the staff in the same staff regulations and rules and Statutes of the Tribunal. . . . It would be impossible for this Tribunal, as it has been impossible for the Appeals Board, to exercise properly its jurisdiction and to arrive at positive conclusions in cases properly before it if the reasons and considerations that constitute the basis of the action of the Secretary-General were to remain in the inner conscience of the Administration. . . . The guarantees afforded to the members of the staff by the regulations and rules require, not only that the Secretary-General be guided subjectively in his decisions by the imperative mandates of these regulations and rules, but equally that these decisions and their reasons be subject objectively to the consideration of the quasi-judicial machinery provided for as a guarantee in the same regulations and rules. . . ."

(3) *On the non-renewal of fixed-term appointments*—that the indiscriminate use of fixed-term appointments may give rise to expectancies of continued employment, and that the Tribunal should consider appeals for equitable relief on the merits of the case. The Tribunal said: ". . . Many of the fixed-term contracts are, in fact, held by personnel engaged in work which it may reasonably be predicted will be performed by staff employed directly by the United Nations for as long as the United Nations itself should continue. . . . since . . . fixed-term contracts are not exclusively employed under conditions which reasonably predicate a termination of the contractual relationship when the work has been completed, they may give rise to expectancies not necessarily concluded by the fact that a fixed date of termination is incorporated in their provisions. As a general rule, it is difficult to see how the failure to renew a fixed-term contract, general compliance in other respects assumed, can be regarded as inflicting an injury justifying recovery on the contract by the holder of the agreement. On the other hand, since the fixed-term instrument is indiscriminately used by the United Nations and may in some circumstances give rise to expectancies of continuation beyond the specified date of termination, the Tribunal will consider appeals for equitable relief on the merits of the case with respect to holders of expired fixed-term contracts."

[Unreported.]

Note.—The Tribunal subsequently considered the case of each complainant individually in the light of the principles laid down in the above decision, and the supplementary arguments of the parties in the light thereof, including the submission by the Secretary-General of reasons for termination, and came to the following conclusions :

Howrani : The causes assigned by the Secretary-General for the termination (*i.e.*, lack of professional competence and failure to perform his work satisfactorily) constituted a reasonable statement of grounds for termination. However, there was a marked disparity between the service ratings of the complainant and the decision to terminate his appointment, and it could not be considered that a reasonable effort had been made to secure another post for him. The Tribunal found that an essential element of due process was lacking and ordered that the decision to terminate the complainant's appointment be rescinded. (September 4, 1951.) The Secretary-General having decided not to reinstate the complainant but to grant him compensation for the injury sustained, the complainant claimed damages amounting to some 183,000 dollars, corresponding to his salary and allowances until retirement and the actuarial value of his retirement pension. The Tribunal ruled that the complainant had pleaded certain possibilities involved in his temporary-indefinite contract, the materialisation of which the nature of the contract in no way guaranteed. The Tribunal awarded the complainant an indemnity amounting to his salary for the period elapsed between the time of termination and the time of judgment, plus an indemnity for termination fixed *ex aequo et bono*, the total amounting to 7,500 dollars (November 12, 1951).

Picou: The Tribunal held that the application was not well founded (September 4, 1951).

Kehoe: The Tribunal found that the very special position occupied by the complainant in the Bureau of Personnel involved a relationship of confidence *vis-à-vis* the Director of that Bureau, and that the complainant did not enjoy such confidence. There were adequate grounds for termination, all elements of due process had been satisfied and the application was not well founded (September 4, 1951).

Keeney: The Tribunal found that, while the statement of cause assigned by the Secretary-General for the termination of the temporary-indefinite contract of the complainant was in the style of conclusions rather than causes, and lacked the specificity which the Tribunal regards as desirable, they undoubtedly constituted adequate reasons for termination. However, inasmuch as the complainant was at no time in a position to plead directly to the statement of cause for termination assigned by the Secretary-General, an essential element of procedural due process was lacking. The Tribunal found the application well founded and rescinded the decision to terminate the appointment (September 4, 1951).

Alper: This was the only case of a complainant holding a fixed-term appointment ; he complained of improper termination. The Tribunal found (*a*) that the complainant suffered no injury in respect of which recovery upon his expired fixed-term contract could reasonably be claimed, and (*b*) that the history of the complainant's

Case No. 142 *Contd.* contractual relationship to the United Nations was such that no reasonable expectancies of renewal of his fixed-term contract or of the award of a more permanent contract were raised. Accordingly, the Tribunal considered that the application was not well founded (September 4, 1951).

[None of these five decisions is reported.]

Case No. 143 **International Organizations—Officials of—Participation in Pensions Fund—Nature of Pensions Fund—Officials of the League of Nations.**

Avenol *v.* Pensions Fund of the League of Nations.

Administrative Tribunal of the International Labour Organization. February 24, 1947.[1]

The Facts.—Article 9 (*f*) of the Regulations of the Staff Pensions Fund of the League of Nations provided that the retiring pension shall in no case exceed 25,000 Swiss francs. The complainant, who had been an official of the League of Nations since February 1, 1923; became Secretary-General of the League on July 1, 1933, and held that position until his resignation took effect on September 1, 1940. The complainant would have been entitled to a 25,000 francs pension as from January 1, 1936, had he retired on that date. The amount of the pension would have increased annually by 4,500 francs for each year of contributory service thereafter, had the rule of maximum not operated. The complainant claimed that his contributions to the Pensions Fund between January 1, 1936, and September 1, 1940, should be refunded, together with interest at the normal rate of interest of the Pensions Fund, since he had derived no further benefits from the payment of contributions during that period, while the risks assumed by the Pensions Fund had not increased.

Held: that the claim must be rejected and the complainant's deposit be forfeited since the claim was contrary to the purpose of a mutual benefit society, as expressly stated in the Pensions Fund Regulations.

The Tribunal said: ". . . The complainant had freely decided to become a participant in the League of Nations Pensions Fund and knew perfectly well the Regulations of the Fund, which were unambiguous and were not capable of interpretation. When the complainant remained in active service, although he had already acquired a right to the maximum retirement pension, he did not put forward until he left the service of the League any protest or reservation with respect to the deductions which continued to be made from his salary [for the purpose of the Pensions Fund]. Those deductions were perfectly legitimate since they were made for the purpose of a mutual benefit society created with a view to ensuring adequate retirement provisions for the whole of the staff [of the League]. Therefore, the participants necessarily agreed to renounce the excess payments made by some participants to benefit other participants, within a framework clearly defined by the statutory rules of the Pensions Fund."

---

[1] It is considered that certain legal questions of a general character relating to the status and conditions of employment of international officials fall properly within the scope of *International Law Reports.* They may be deemed to form part of what may be described as International Administrative Law. In view of this some of the decisions given before 1951 may properly be reported here.

[Report: International Labour Office, *Official Bulletin*, Vol. XXX, No. 5, p. 391.]

NOTE.—(1) Article 26 of the Staff Pensions Regulations of the League of Nations provided that any complaint of non-observance of the Regulations or of rules made in virtue thereof in regard to an official or the wife, husband or children of an official, or in regard to any class of officials to which the Regulations or the rules applied, should be deemed to be a complaint of non-observance of the terms of appointment of the official concerned within the meaning of the Statute of the International Labour Organisation Administrative Tribunal, and could accordingly be submitted to that Tribunal, whose decision should be final. For this purpose, the Tribunal is open to former officials of the League of Nations. Article II (3) of the Statute of the Tribunal contains a similar provision. It is on the basis of those provisions that the complaint was lodged and that the Tribunal assumed competence.

(2) It was contended on behalf of the respondent that the complainant did not allege non-observance by the Pensions Board of any provision of the Regulations and Rules of the Fund, and that therefore there existed no grounds for an appeal to the Tribunal. Alternatively, since the provisions of the Regulations and Rules of the Fund had been observed, the complainant could only call into question the Regulations and Rules of the Fund. Those Regulations and Rules had been approved by the Assembly of the League of Nations, and the Board was bound by them. The Board was, therefore, not a party to the dispute. By way of subsidiary argument, it was contended that the complaint had not been lodged within 90 days of the notification of the decision appealed against, as required by the Statute of the Tribunal, and that the complaint was therefore not receivable. The Tribunal did not consider those contentions, but decided on the merits of the case.

Case No. 144 **International Organizations—Officials of—Continuity of Employment—Officials *en disponibilité*—Salary of—Monetary Value of—Judgment of the Tribunal—Enforceability—Exequatur—International Institute of Intellectual Co-operation.**

WEISS *v.* INTERNATIONAL INSTITUTE OF INTELLECTUAL CO-OPERATION.

Administrative Tribunal of the International Labour Organization. February 25, 1947.[1]

THE FACTS.—As a result of the outbreak of hostilities in 1939, the activities of the International Institute of Intellectual Co-operation were first drastically curtailed and most of its staff dismissed, and finally suspended in fact if not in law because its Governing Body was unable to meet. Some officials of the Institute remained on the premises, in Paris, and administered the assets of the Institute, under German supervision. The complainant moved to the non-occupied zone of France, where part of the assets of the Institute had been transferred, and sought to maintain some of the Institute's activities. At the end of the war, the newly appointed Director of the Institute refused to recognize these activities and to pay the complainant's salary arrears for the war period. The complainant claimed to have been a member of the staff until the liberation of France in the capacity of an official *en disponibilité*. As such, he claimed : (*a*) full payment of the sums to which he was entitled as salary *en disponibilité* on the basis of 75 per cent. of his normal salary ; (*b*) payment to the Pensions Fund of contributions relating to that period ; and (*c*) reimbursement of his travel and subsistence expenses. The validity of the claim depended on the authority of the claimant to carry out activities on behalf of the Institute with a view to maintaining the permanence of the organization during the war-time emergency, in spite of the fact that the Governing Body, which was unable to meet, made no decision concerning such activities. The case hinged on three questions : (*a*) were M. Herriot and M. de Reynold, President and Vice-President of the Governing Body of the Institute, respectively, authorized in the circumstances of 1939 to act in the name of the Governing Body to keep the Institute in being by maintaining a skeleton staff ? ; (*b*) did they delegate this power to the complainant and to M. de Montenach on February 19, 1941 ? ; (*c*) was the complainant, in using this delegation of power, justified in prolonging his own services *en disponibilité* until the recommencement of normal activity by the Institute ? On being questioned by the President of the Tribunal, President Herriot replied : (*a*) that the Governing Body of the Institute authorized him in 1939, because of the exceptional circumstances, to take any decision in the name of the Institute concerning, in particular, the permanence of the organism and the maintenance in service or *en disponibilité* of certain members of the staff; (*b*) that during a meeting on February 19, 1941, the complainant and M. de Montenach were expressly instructed to take all measures to maintain this skeleton staff; and (*c*) that the measures taken by the complainant and M. de Montenach either jointly or separately for the purpose of maintaining the skeleton staff, including the complainant himself, *en disponibilité* until the liberation, fell within the limits of the delegation of powers vested in them.

---

[1] See *supra*, p. 456, n. 1.

Held: that the complainant rightfully understood himself to be in the position of an official maintained *en disponibilité* and that when normal conditions were re-established the Institute wrongfully refused to pay him the arrears of salary to which he was entitled; that the defendant be ordered to pay the sums claimed by the complainant; and that the complainant be awarded as damages the sum of 200,000 French francs.

As to the question of damages, the Tribunal said: ". . . the delay in paying the sums due, the extremely painful changes in economic conditions, and the need for [the complainant] to provide for his defence, justify, quite apart from any consideration relating to the changes in the purchasing power of the franc, the allocation of compensation under the heading of damages . . . the indubitable moral prejudice suffered by [the complainant] by reason of the insecurity in which he has been since the recommencement of normal activity by the Institute should also be taken into consideration."

[Report: International Labour Office, *Official Bulletin*, vol. XXX, No. 5, p. 395.]

NOTE.—(1) The Tribunal made this award in an arbitral capacity. The International Institute of Intellectual Co-operation was a technical organization of the League of Nations but was created by French legislation, under which it was granted legal personality. Therefore, in view of the legal and financial autonomy of the Institute, its officials could not be considered as officials of the League of Nations and did not have access to the Tribunal, under the Statute approved by the League Assembly. However, with the concurrence of the Secretary-General of the League and of each member of the Tribunal, Article 36 of the Staff Regulations of the Institute conferred upon the Tribunal arbitral competence to pass upon disputes between the Institute and its officials in respect of decisions alleged to be, from the legal point of view, contrary to the rules governing contracts of employment. The Tribunal in its arbitral capacity was bound by no national legislation, and determined its own procedure. The cost of arbitration was to be refunded by the Institute to the Secretariat of the League of Nations.

Case No. 144 *Contd.* (2) With respect to the calculation of the amount of damages, reference was made to the " extremely painful changes in economic conditions ", but the Tribunal adhered to its earlier rejection of claims based on the depreciation of the currency in which salaries were paid. See, in this connection, *Desplanques* v. *Pensions Fund of the League of Nations* (Administrative Tribunal of the League of Nations, Judgment No. 19, May 6, 1938 [unpublished]).

(3) At the time of the judgment in the case above reported, the International Institute of Intellectual Co-operation had ceased to exist in fact, and was not in a position to give effect to the judgment. The complainant sought the attachment of the remaining assets of the Institute. In the course of the proceedings the question of the enforceability of the judgment in France was raised. By decision of October 8, 1948 (unreported), the Vice-President of the Tribunal Civil de la Seine granted the *exequatur* of the judgment. The Tribunal said : "... the judgment contains nothing which is against public policy . . . [The Tribunal] rules that the judgment shall be executed as provided therein."

(4) A similar decision was taken with regard to the claim of another official who remained *en disponibilité* under Mr. Weiss' instructions throughout the war. This claim was brought by the widow of the official, acting as guardian of his children. (See *Mrs. Charles Mercier* v. *International Institute of Intellectual Co-operation* ; International Labour Office, *Official Bulletin*, vol. XXX, No. 5, p. 404.)

Case No. 145

International Organizations—Officials of—Dismissal of—Obligation of Organization to Supply Reasons for Dismissal—Alleged Assistance to the Enemy—International Institute of Intellectual Co-operation.

HICKEL *v.* INTERNATIONAL INSTITUTE OF INTELLECTUAL CO-OPERATION.

Administrative Tribunal of the International Labour Organization. February 27, 1947.[1]

THE FACTS.—The complainant, by a contract dated October 1, 1931, was appointed to the post of Principal Editor of the Institute of Intellectual Co-operation for a fixed period of seven years, and was maintained in that employment for a further period of seven years from October 1, 1938. His salary was paid to him regularly until September 30, 1944. No payments were made thereafter, and on October 6, 1945, the Acting Director of the Institute informed the complainant " that M. Henri Bonnet, former Director of the Institute . . . discontinued the payment of your salary as from October 1944. This measure was taken in execution of a mandate which the Governing Body gave my predecessor and it is by virtue of this authority that your contract was terminated. . . ." The complainant then submitted to the Governing Body of the Institute a claim that there should be a further examination of the decision of M. Bonnet, and requested communication of M. Bonnet's decision. Without alluding to a decision of the Governing Body, the Acting Director of the Institute replied to the complainant ". . . it may be that the decision of M. Henri Bonnet concerning you . . . was not taken with all necessary legal safeguards, probably as a result of the haste with which M. Bonnet had to act at that time. It goes without saying that in my view and, I suppose, in yours, it remains essentially valid." No decision of the Governing Body was ever communicated to the complainant. He requested the Tribunal to decide that the termination of his contract of employment was in violation of the Staff Regulations of the Institute, and claimed damages and costs. The defendant argued that it was true that the Institute ceased to pay the salary of the complainant on September 30, 1944, although he was in possession of a contract which did not expire until September 30, 1945. The decision was taken by M. Bonnet, at that time Director of the Institute, on his return from North Africa after the liberation of Paris. As a result of the disorganization which existed in the services of the Institute following the German occupation and the continuation of the state of war, together with the fact that M. Bonnet fell ill at that time and was then called upon to fill the high functions of Ambassador of France to the United States of America, notification of the decision was not made to the complainant.

---

[1] See *supra*, p. 456, n. 1.

The contract of employment was in fact terminated in accordance with Article 39 of the Staff Regulations, which provided that the appointment of an official guilty of misconduct may be terminated at any time and that in such case the official shall not be entitled to notice, allowances or leave. The Institute considered the fact that the complainant had accepted from the Government of Vichy, which had broken with the League of Nations, an appointment as official in the Economic Control, a post which it regarded as incompatible with the duties of an official of the Institute and as constituting misconduct within the meaning of the Staff Regulations. M. Bonnet took this decision by virtue of the exceptional powers conferred upon him by the Committee of Directors in April 1939. The defendant contended that it might, moreover, be considered that this decision was ratified, at least by implication, by the Governing Body of the Institute at its sitting of October 25, 1945, since the latter made no observation concerning the state of the personnel. The defendant added that even if the Tribunal considered that misconduct had not been proved, the injury caused to the complainant could not entitle him to compensation amounting to more than one year's salary (*i.e.* the maximum termination indemnity provided for in the Staff

Case No. 145 *Contd.* Regulations, which amounted in this case to 36,000 French francs). The argument of the complainant that this compensation should be increased proportionally to the depreciation of the franc could not be accepted, for the Staff Regulations of the Institute had never admitted that the staff should enjoy the benefit of a guaranteed rate of exchange.

Held: that the complaint was well founded, and damages must be awarded *ex aequo et bono*. No official could be considered guilty of misconduct unless he had first been informed of the charge and been given an opportunity of defending himself. The complainant's acceptance of outside employment in the circumstances outlined above did not constitute misconduct, nor did his employment in a subordinate, non-political capacity in a government service established by the Government of Vichy constitute collaboration with the enemy of his country.

The Tribunal said: ". . . in order that an official may be considered as ' guilty ' (of misconduct) it is obviously necessary that he should first be informed in clear and precise terms of the grave charge against him and that he then have the possibility of defending himself before the competent authority before the latter takes its decision . . . none of these conditions was fulfilled in the case of the complainant. . . . The charge appears in no way to be of a character necessary to justify immediate dismissal without notice or compensation. . . . While it is true that the acceptance of any employment outside the service, except with special authorisation, is forbidden to officials appointed by the Institute, this provision is obviously only applicable when the Institute is functioning in normal conditions and in particular is in a position to use the services of its staff and to pay them in accordance with its contracts. . . . At the time when the complainant accepted employment, none of these conditions was applicable. . . . The employment in question was of a purely temporary and subordinate character, its remuneration was small and it did not involve any activity of a political character on the part of the complainant . . . it was an exclusively economic service which was not suppressed at the liberation and the national importance of which was clear. . . . It does not seem that the circumstance that, at the time when this employment was given, *de facto* authority was vested in the Government of Vichy, should have any influence in an evaluation of the charge, especially as the Institute itself at that time accepted the subsidies which the Government of Vichy continued to pay to it and used them to pay its staff. . . . The attitude of the complainant throughout the period of occupation appears to have been irreproachable from the point of view of dignity and patriotism and his actions in no way constituted collaboration with the enemy of his country."

[Report: International Labour Office, *Official Bulletin*, vol. XXX, No. 5, p. 397.]

NOTE.—The Tribunal assumed jurisdiction in an arbitral capacity, conferred on it by the Staff Regulations of the Institute: see *Weiss* v. *International Institute of Intellectual Co-operation* (Case No. 144 in this volume), where also the method of calculation of damages appears.

International Organizations—Officials of—Contracts of Employment—Frustration of—Effects of War—Assessment of Damages—General Principles of Law—International Institute of Intellectual Co-operation. **Case No. 146**

ROTHBARTH *v.* INTERNATIONAL INSTITUTE OF INTELLECTUAL CO-OPERATION.

Administrative Tribunal of the International Labour Organization. February 27, 1947.[1]

THE FACTS.—By decision of the Governing Body of the International Institute of Intellectual Co-operation of August 6, 1936, the contract of the complainant was extended for a period of five years, expiring on September 30, 1941. In 1939, the complainant was in Switzerland, where she was undergoing medical treatment. As a result of the state of international tension then obtaining, and subsequently of the outbreak of the Second World War, the complainant found herself unable to return to France to resume her duties. On August 28, 1939, the complainant had been advised by the Acting Director of the Institute not to return to France and to remain in Switzerland until she was recalled. Shortly thereafter, the complainant desired to resume her duties in Paris, and in order to enable her to do so, steps were taken both by the complainant and the Director of the Institute to secure the necessary visa to allow of her returning to France. In the meanwhile, the complainant was requested by the Institute to perform certain tasks for the Institute. The Institute paid the complainant her full salary until November 30, 1939, and, on the basis of a decision of the Director of the Institute, half her salary between November 30, 1939, and May 30, 1940. The complainant claimed (*a*) that the Institute should pay her full salary until the expiry of her contract, since she had at all times been willing to fulfil her obligations under her contract and had in fact continued to perform work for the Institute; (*b*) that she be granted a termination indemnity amounting to six months' salary on the basis of an alleged decision of the Governing Body of March 7, 1941, to award such termination indemnities where contracts had not been renewed without advance notification; (*c*) that contributions to the Retirement Fund be paid by the Institute for the entire period preceding the expiry of the contract; and (*d*) that the sums awarded to the complainant be increased, by a percentage to be determined by the Tribunal, in order to take into account the increased cost of living, *ex aequo et bono.*

---

[1] See *supra*, p. 456, n. 1.

Held: that the complainant's contract was not frustrated by force of circumstances; that she remained an official of the Institute until the expiry of her contract and that consequently her full salary was due until the expiry of that contract, together with the contributions to the Retirement Fund for the same period; that she was not entitled to any further payment after the expiry of her contract since no decision providing for such payment was taken by the Governing Body; that general principles of law did not allow of an increase of the sums due to the complainant to take into account the increased cost of living since the sums became due, but that the delay in paying those sums to the complainant had caused her an undoubted and considerable prejudice, evaluated by the Tribunal *ex aequo et bono* at 100,000 French francs, and that the Institute having failed to respect the terms of the contract, it was under an obligation to pay the complainant an indemnity corresponding to the prejudice for which it was responsible.

The Tribunal said: ". . . When the events of 1939 occurred, the complainant was in Switzerland and did not return to Paris; this attitude did not appear to be due to force of circumstances which might have entitled both parties to break a contract of employment running for a stated term. While it is true that the complainant alleged that she was in ill health, she nevertheless expressed her eagerness to return to Paris, and moreover, the Institute never required her to submit a medical certificate indicating that she was prevented by ill health from returning to Paris. It is established that the complainant took numerous steps to secure permission to return to France, but that she failed. Moreover, M. Belime, who at the time was replacing M. Bonnet as Director of the Institute, specifically invited the complainant on 28 August 1939 not to return to Paris on any account, to wait in Switzerland until she was recalled and to trust in the Institute, her interests being safeguarded. The Complainant remained at all times at the disposal of the Institute and while her contract was in force was requested to undertake certain tasks which she undertook immediately and completed as requested. It is inconceivable that such requests should have been made had the complainant not been considered still as a member of the staff of the Institute. Therefore, the complainant did not cease to be in service and no circumstance justifies the reduction of her salary by half during a first period of disponibility and thereafter the withholding of any remuneration while her contract was still in force. The complainant is therefore entitled to the full payment of her salary for the entire duration of her contract, *i.e.* until 30 September 1941, but is not entitled to claim any payment after that date, having failed to prove that a decision of the Governing Body of the Institute modified her legal position in that respect. It is obvious that the Institute is obliged to pay its contribution to the Retirement Fund with respect to the same period. Regarding the revalorisation of the French franc, the general principles of law do not allow of accepting the claim as put forward but it is established that the delay in paying the sums to which the complainant was undoubtedly entitled caused her a definite and considerable prejudice. Aside from the moral injury issuing from her anxiety and the hardships she suffered, she had to provide for her subsistence with inadequate resources and in increasingly difficult economic conditions. She had, in addition, to provide out of her reduced means for the presentation of her case. The Institute is, therefore, responsible for breach of contract (*en état de faute contractuelle*) and must indemnify the complainant for the prejudice she suffered. . . ."

[Report: International Labour Office, *Official Bulletin*, vol. XXX, No. 5, p. 401.]

NOTE.—The Tribunal assumed jurisdiction in an arbitral capacity, conferred on it by the Staff Regulations of the Institute: see *Weiss* v. *International Institute of Intellectual Co-operation* (Case No. 144 in this volume), where also the method of calculation of damages appears.

International Organizations — Officials of — International Labour Organization—Contracts of—Period of Probation—Termination of Contract. **Case No. 147**

MARSH *v.* INTERNATIONAL LABOUR ORGANIZATION.

Administrative Tribunal of the International Labour Organization. April 5, 1951.

THE FACTS.—This was an appeal by a probationer official against the decision not to confirm her appointment, which was based on probationary reports tainted by irregularities. At the material time, Article 26 of the Staff Regulations of the I.L.O. provided that at least once in every six months of probation, and in any case three months before the expiry of any given period of probation, the responsible chief of any official on probation shall submit a considered report on his work and official conduct. A first report on the complainant's work and official conduct was submitted two months before the expiry of the period of probation, in violation of the aforesaid provision. The report was favourable but, on the recommendation of the Promotions Board, the Director-General decided to extend complainant's period of probation by six

Case No. 147 *Contd.* months. During the first three months complainant was detached to another service, the chief of which did not write a report, nor was a report prepared three months before the expiry of the extended period of probation. Claimant then went on sick leave before resuming work, with the result that she was under the authority and supervision of her usual chief for a maximum period of only two months instead of six, a period on the basis of which, nevertheless, the chief of service included in her report, prepared only shortly before the expiry of the period of probation, observations so unfavourable that the Promotions Board recommended her dismissal, and the Joint Committee to which she appealed against the recommendation confirmed the opinion of the Promotions Board which finally led the Director-General to dismiss her.

Held: that the decision to dismiss the complainant must be annulled, that the complainant be reinstated as a probationer official in the position she occupied at the moment that decision was taken, and that a new period of probation of six months be served.

The Tribunal said: ". . . the whole procedure instituted preparatory to a decision being taken by the Director-General, and, in particular, the time limit of three months for the submission of the report, has been prescribed in the obvious interest of the probationer official, in order to enable him to avail himself in full safety and in good time of the means of defence and of appeal which may be open to him prior to the sovereign decision of the superior authority being taken . . . the irregularities in the application of the Regulations which are present in the procedure followed during the prolongation of the period of probation [appear to have prejudiced the complainant] in as much as the first half of this probationary period was not made the subject of any appreciation on the part of the head of [the] service [to which complainant was detached], an appreciation which at least could have been and ought to have been appended to a later report; the report . . . related in fact to a period of probation of only two months . . . not only was this report not prepared until after the time limit laid down in Article 26, but, also, it can in no way be regarded as showing an effective and reasonable appreciation of official duties spread over a six months' period of service—an appreciation to which the probationer official was entitled by the very fact of the corresponding prolongation of the probationary period . . . it is, however, this report tainted by irregularities which undeniably exercised a determining influence . . . on the subsequent procedure, including the decision of the Director-General. . . ."

[Report: International Labour Office, *Official Bulletin*, vol. XXXIV, No. 3, p. 264.]

International Organizations—Officials of—League of Nations—Participation in Pensions Fund of—War—Effect of—Contract of Employment—Frustration of—Refund of Contributions to Pensions Fund. **Case No. 148**

STARKE *v.* PENSIONS FUND OF THE LEAGUE OF NATIONS.

Administrative Tribunal of the International Labour Organization. April 5, 1951.

THE FACTS.—This was an appeal against a decision of June 24, 1950, of the Administrative Board of the Pensions Fund of the League of Nations to the effect that the Board did not possess any authority to order the refund of the complainant's contributions to the said Fund upon termination of his contract of employment after less than three years' service. The complainant, after nearly four years of probationary service in the League of Nations Secretariat, was given a seven years' contract of employment with effect from July 1, 1939, under the terms of which contract the claimant was admitted to the League of Nations Staff Pensions Fund. Pursuant to the regulations of that Fund, monthly deductions at the rate of 6½ per cent. of the complainant's monthly salary were paid to the Fund from July 1, 1939, to December 14, 1939. The complainant's contract was suspended with effect from December 14, 1939, and terminated with effect from December 14, 1940, pursuant to a decision of the League of Nations, made in October 1940, that in view of the then hostilities the contracts of employment of all officials on suspended status should be terminated. The complainant then requested the refund of the pensions payments and contributions he made to the League of Nations Staff Pensions Fund from July 1, 1939, to December 31, 1940. The complainant asserted that provision for his participation in the Staff Pensions Fund formed part of his contract of employment, that such contract had been frustrated through force of circumstances, and that, notwithstanding the provisions of the Pensions Fund Regulations, the amount of his own contributions to the Fund as well as that of the payments made to the Fund on his behalf by the League of Nations should be refunded.

Held: (1) *On the Question of Jurisdiction*: that the Tribunal had no power to give a ruling on any dispute relating to the decision to effect a collective termination of contracts taken by the League of Nations in 1940, and that it could not, therefore, take account of the legal considerations, whatever their merits and interest, advanced by either party on this subject.

(2) *On the Main Issues*: that under Article 9 of the Staff Pensions Regulations, sub-paragraph (*e*), there was no provision

Case No. 148 *Contd.* for the payment or refund of pensions or contributions to an official who had completed less than three years' service after receiving a regular contract, and, therefore, there was no explicit provision of the said Regulations which had not been observed.

[Report: International Labour Office, *Official Bulletin*, vol. XXXIV, No. 3, p. 262.]

NOTE.—See also *Avenol* v. *Pensions Fund of the League of Nations*, Case No. 143 in this volume.

Case No. 149 **International Organizations — Officials of — World Health Organization—Contracts of Employment—Period of Probation —Termination of—Discretion of Employing Organization.**

MANGE *v.* WORLD HEALTH ORGANIZATION.

Administrative Tribunal of the International Labour Organization. April 5, 1951.

THE FACTS.—Article 131 (3) of the W.H.O. Staff Regulations provided, at the material time, that the total duration of an official's period of probation should not exceed 18 months. Following three temporary contracts of short duration, the complainant accepted a fourth contract to work as a stenographer for a term of two years, including a period of probation of six months dating from December 1, 1948. During the period of probation, the complainant was transferred to the Library and consequently promoted from Grade 4 to Grade 5 of the General Service Category, the new duties being those of a Library Clerk, with effect from April 14, 1949, and entailing a six months' period of probation commencing on that date. This period of probation was extended for six months. By letter of December 24, 1949, the Administration notified the claimant that her appointment was terminated. The claimant asserted that the extension of her period of probation was unjustifiable and illegal, in that the total period of probation exceeded 18 months, and that her contract became confirmed on December 20, 1949, as she had served as a stenographer from June 21, 1948, onwards. The Administration claimed that the contract of December 1, 1948, could not become effective, as the complainant was appointed a Library Clerk as from April 1, 1949. Consequently, the non-confirmation of the complainant's contract, following two unsatisfactory periods of probation, was in accordance with the Staff Regulations, and could not give rise to an indemnity.

Held: that the claim must be dismissed. The Tribunal said: ". . . the claimant, who was a probationer official from 1 December 1948 and not, as she contends, from 21 June 1948, was still a probationer official at the time of dismissal and the period of probation did not exceed 18 months . . . whereas provisions of the Staff Regulations concerning the period of probation have been observed, the Director-General decides on his exclusive authority the course to be taken with regard to a probationer official."

[Report : International Labour Office, *Official Bulletin*, vol. XXXIV, No. 3, p. 260.]

Note.—This decision clarifies the position of international officials during the period of probation. Two conclusions can be drawn : (i) the *terminus a quo* of a period of probation is to be calculated from the date of appointment provided for in the contract of appointment in force at the time of termination, irrespective of previous periods of unbroken service under temporary contracts ; (ii) the confirmation or termination of the appointment of an official on probation is within the exclusive authority of the Director-General and is not subject to review by the Administrative Tribunal.

F—MISCELLANEOUS

United Nations—Military Observers to Supervise Execution of Armistice Agreement—Extent of Authority of.

See Case No. 39 (*Attorney-General of Israel* v. *El-Turani*).

PART X

DISPUTES

A—ARBITRATION

II.—Procedure

ii.—Competence. Competence to Determine Jurisdiction

International Tribunals—Supremacy over Municipal Courts—Jurisdiction Not Ousted by Existence of Judgment of a Municipal Court.

See Case No. 127 (*Guillemot-Jacquemin Claim*).

B—INTERNATIONAL COURT OF JUSTICE

II.—Contentious Jurisdiction

ii.—Procedure

International Court of Justice—Contentious Jurisdiction—Procedure—Intervention—Article 63 of the Statute.

See Case No. 113 (*Haya de la Torre Case* (*Colombia* v. *Peru*)).

iv.—Judgment

International Court of Justice—Judgments of—Execution of.

See Case No. 113 (*Haya de la Torre Case* (*Colombia* v. *Peru*)).

International Court of Justice—Judgments of—Execution of—Enforcement by Municipal Courts—The Law of Belgium.

See Case No. 2 (*Socobel* v. *Greek State*).

III.—Advisory Jurisdiction

i.—Competence

International Court of Justice—Advisory Jurisdiction—Scope of—Right of General Assembly to ask for Advisory Opinion Bearing on Interpretation of Convention Concluded under the Auspices of the United Nations.

See Case No. 118 (*Reservations to the Convention on Genocide*).

C—CONCILIATION

International Conciliation—Conciliation Commission Acting as an Arbitral Tribunal—Supremacy over Municipal Courts—Necessity for Discontinuing Proceedings in Municipal Court. **Case No. 150**

S.A.I.M.I. CLAIM.

Franco-Italian Conciliation Commission.
(Sorrentino, Perier de Feral.)
November 13, 1951.

THE FACTS.—This was a claim under Article 78 (3) [1] of the Peace Treaty of Paris, 1947, by certain French nationals for the invalidation of the transfers of some 1,720 shares in the S.A.I.M.I. Company to certain Italian nationals, on the ground that the sale of the shares in 1940 had taken place under duress on the part of the then Minister of Corporations. It was contended on behalf of Italy that the Conciliation Commission was not competent to hear the claim, which was the subject of proceedings before a municipal court.

Held: that the Commission was competent. Under a well-known principle of international law, the international jurisdiction set up by a treaty prevails over the jurisdictions created by the municipal law of States. The Commission said: " The Conciliation Commission, an international tribunal set up by a treaty, has supremacy over municipal courts. If a municipal court is seised of this case, it is necessary, in order that the international tribunal may hear and decide the claim, that the claimants . . . should discontinue the proceedings in the municipal court."

[Report: *Recueil des Décisions*, Part 1, p. 38.]

NOTE.—This decision was expressly followed by the Commission in the *Guillemot-Jacquemin Claim* (see Case No. 127 in this volume).

International Conciliation—Commission of Conciliation as an Arbitral Tribunal—Supremacy of Jurisdiction of—Parallel Proceedings in Municipal Courts.

See Case No. 136 (*Ottoz Claim*).

---

[1] Article 78 (3) provides: " The Italian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war."

International Conciliation—Commission of Conciliation as an Arbitral Tribunal—Nature of Proceedings before—Binding Force of Decision of—Governments Parties to Proceedings and Individual Interests.

See Case No. 136 (*Ottoz Claim*).

PART XI

WAR AND NEUTRALITY

A—WAR IN GENERAL

I.—Definition and Technical Meaning of War. Belligerency and Insurgency

War—Meaning of—Insurance against War Risks—" Molest " (War Risks) Clause in Policy—Extension to Loss Caused by Looting. **Case No. 151**

AMERICAN BUSINESS MACHINES CORPORATION *v.* ONDERLINGE OORLOGSSCHADEVERZEKERING MAATSCHAPPIJ.

Holland, District Court of Amsterdam. January 10, 1951.

THE FACTS.—In December 1944 and January 1945 the " Beauftragter " in the Netherlands of the German " Reichsminister für Rüstung und Kriegsproduktion " ordered the removal to Germany of a number of machines belonging to the plaintiffs, for the benefit of the mechanized information service of that Ministry, without payment and contrary to the relevant provisions of the German Occupation Ordinance No. 139/1942. After the war the plaintiffs claimed compensation from the defendants under an insurance policy covering " molest " [1] risks, resulting from warlike violence (*oorlogsgeweld*), war, etc. The defendants contended that the claim was not covered by the molest clause, because no force of arms had been used nor had the removal of the machines been caused by war, and because events of this nature could not have been foreseen by the parties.

Held: that the defendants must pay compensation. The removal of the machines was so closely connected with, and resulted so clearly from, a state of war that the loss to the plaintiffs must be attributed to war. Moreover, such occurrences as looting and arson were so generally known from history as normal in war that they are to be expected in every war.

[Report: *N.J.*, 1951, No. 451.]

War—Meaning of—Co-Belligerency.

See Case No. 193 (*Re Scarpato*).

---

[1] *Anglice*: " free from consequences of hostilities or warlike operations " (Arnould, *Marine Insurance*, 13th ed. (1950), p. 905). For the history of the " molest " clause see *International Law Reports*, 1950, pp. 343–344.

IV.—Belligerent Forces

Belligerent Forces—Organized Resistance Movement—Status of—Recognition by Government-in-Exile.

See Case No. 167 (*Military Prosecutor* v. *B. and van E.*).

V.—Effects of Outbreak of War

i.—In General

Case No. 152 **War—Effects of—Statutes of Limitation—Intercourse between Residents of Belligerent Territories—Termination of Suspension of Statutory Period—Relevance of Termination of Hostilities as Distinguished from Termination of War—International Law—Relation to Municipal Law—Incorporation of International Law into Municipal Law of the United States—Superiority of International Law over Municipal Law—Presumption of Legislative Intention Not to Derogate from International Law.**

PETERS *ET AL. v.* MCKAY.

United States, Supreme Court of Oregon, en Banc.
November 14, 1951.

THE FACTS.—The petitioners were heirs at law of a decedent who died in Oregon in 1928. In 1932, it having been found that the decedent left no known heirs, the net proceeds of his estate were ordered to escheat to the State of Oregon. The law of Oregon provides that, within ten years after escheat, certain persons may petition for the recovery of the escheated property. In 1942, the petitioners, citizens and residents of the Netherlands, filed a claim, which was quashed on procedural grounds. In 1946, the petitioners, curing the procedural defect, filed anew, alleging that, while more than ten years had passed since 1932, by reason of the Second World War communication by them with their attorneys in the United States was not possible. The petitioners alleged that the Oregon Statute, providing " When a person shall be an alien subject or citizen of a country at war with the United States, the time of the continuance of the war shall not be a part of the period limited for the commencement of the action ", operated in their favour. They contended in the alternative that the war suspended the statute of limitations " as a matter of common law and international law ".

Held: that while the latter contention was correct, the petition must fail in that the Statute was not suspended as to the plaintiffs until the entry of the United States into the war, the earlier occupation of the Netherlands notwithstanding. The Court said:

" This proposition presented issues of extreme delicacy which are entirely new to the jurisprudence of this and many other states. In the entire 189 volumes of the Oregon Reports, not a single case has been digested under the heading of International Law, yet, the rule is firmly established and uniformly recognized that ' International law is a part of our law and as such is the law of all States of the Union (*The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L. Ed. 320 [328]), but it is a part of our law for the application of its own principles, and these are concerned with international rights and duties and not with domestic rights and duties.' *Skiriotes* v. *Florida*, 313 U.S. 69, 61 S.Ct. 924, 927, 85 L. Ed. 1193, 1198. And see *Riddell* v. *Fuhrman*, 233 Mass. 69, 123 N.E. 237; *The Scotia*, 14 Wall. 170, 20 L. Ed. 822. The rule has been briefly stated as follows: ' Unless there is some treaty or statute to the contrary, the law of nations is to be treated as part of the law of the land. The courts of all nations judicially notice this law, and it must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. . . .' 30 Am.Jur., International Law, p. 178, § 7.

" This brief statement is amplified by eminent authors in the field of international law: ' International law, as the local law of each State, is necessarily superior to any administrative regulation or statute or public act at variance with it. There can be no conflict on an equal plane. The precise relationship of a recognized rule of international law to a local statute in contravention thereof is oftentimes obscured by occurrences which take place before the superiority of the former is ultimately established. A local court may be obliged, on account of the nature and the limits of the powers conferred upon it, to enforce the statute; and even a domestic tribunal of last resort may be compelled to affirm such action. This merely signifies that no local forum is possessed of jurisdiction to pass upon the propriety of the conduct of the State in enacting the law; it does not imply that that conduct is internationally defensible, or that the judges approve of it. Moreover, the finality of the local adjudication does not indicate that the conflict has passed through more than a preliminary state. If the controversy be pressed further, through the diplomatic channel, the State whose enactment is denounced by another as at variance with international law may in fact deny the truth of the allegation. It cannot, however, admit the charge without acknowledging responsibility to make reparation. If disagreement as to the nature of the statute or the extent of the harm produced by it proves incapable of adjustment by

Case No. 152 *Contd.* negotiation, and the issue be referred to an international tribunal clothed with requisite jurisdiction, it will denounce the statute (if deemed to violate international law) and formulate its award accordingly. Observance of the award by the delinquent State (possibly entailing amendatory legislation) will terminate the conflict and establish the supremacy of the international obligation.' 1 Hyde, International Law, 2d rev. ed., 16, § 5. See also 1 Hackworth, Digest of International Law, pp. 24 to 39.

" In essence, the rule appears to be that international law is a part of the law of every state which is enforced by its courts without any constitutional or statutory act of incorporation by reference, and while a court may be without jurisdiction to enforce international law in a given case by reason of some controlling statute, nevertheless, relevant provisions of the law of nations are legally paramount whenever international rights and duties are involved before a court having jurisdiction to enforce them.

" This principle is the basis for the extraordinary rule which is applied by the courts in seeking to avoid any conflict between international and municipal statutory law. It is firmly established that courts, in construing a statute, will indulge a strong presumption that the legislature did not intend to violate international law and will read into a statute such qualification or exception as may be necessary to avoid apparent conflict. This they will do unless it unmistakably appears that a statute was intended to be in disregard of a principle of international law.

" '. . . Accordingly, it has been held that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. International law also forms a part of the law of the several states.' 30 Am.Jur., International Law, p. 179, § 7.

" ' If, however, the court has no option to refuse the enforcement of legislation in contravention of principles of international law, it does not follow that in construing the terms and provisions of a statute it may not assume that such principles were on the national conscience and that the congressional act did not deliberately intend to infringe them. In other words, unless it unmistakably appears that a congressional act was intended to be in disregard of a principle of international comity, the presumption is that it was intended to be in conformity with it. It is with such a principle in mind that we now proceed to an examination of the legislation upon which the government relies.' *The Over The Top*, D.C., 5 F. 2d 838, 842.

" ' It is important to observe, however, that States are not commonly disposed to defy by local statute recognized obligations imposed by international law, and that they are instinctively reluctant to admit that domestic enactments manifest such a design. . . . Normally, it is taken for granted that international law prevails throughout the domain of a State and will be respected in the course of all the activities of its several agencies. This is true in the case of the United States. Its tribunals, and in particular the Supreme Court, are reluctant to impute to the Congress or the Executive an intention to violate the law of nations. Moreover those tribunals, when unrestricted by statutory limitations, apply and enforce the principles of international law as a part of the law of the land.' 1 Hyde, International Law, 2d rev. ed., 17, § 5.

" 'The statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe, and which were founded upon the principles of international law.' *MacLeod* v. *United States*, 229 U.S. 416, 434, 33 S.Ct. 955, 961, . . .

" In the light of the principles above stated, we will now consider the proposition that the ten-year limitation in the escheat statute was suspended by war as a matter of international law. We will approach the problem by degrees, and first, by the consideration of analogous rules.

" The first question for consideration is whether, in a proper case, ordinary statutes of limitation which merely bar the remedy, may be tolled by war in the absence of any statutory provision to that effect. The leading case is *Hanger* v. *Abbott*, 6 Wall. 532, 18 L. Ed. 939. In that case the plaintiff, a resident of New Hampshire, sued the defendant, a resident of Arkansas. The cause of action accrued in 1861 and before the outbreak of the Civil War. There was a three-year statute of limitations. The suit was brought in 1865 after the end of the war. Defendant pleaded the statute of limitations. The plaintiff replied that during the entire period from 6 May 1861 until 1 January 1865 all lawful courts of the state of Arkansas were closed as a result of the war, and that such period should not be taken as any part of the three-year limitation, and therefore plaintiffs alleged that they did commence their suit within three years. The court held first that : 'War, when duly declared or recognized as such by the war-making power, imports a prohibition to the subjects, or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country. . . .' *Hanger* v. *Abbott*, *supra*.

" The court held further that rights of suit are only suspended during the war and are revived upon the restoration of peace. The court pointed out that statutes of limitation are statutes of repose.

Case No. 152 *Contd.*

" '. . . They proceed also upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period, and they take away all solid ground of complaint, because they rest on the negligence or laches of the party himself. . . .' *Hanger* v. *Abbott*, *supra.*

" After referring to the usual statutory provisions whereby the period of limitation is tolled, in the case of insanity and the like, the court conceded that ' Cases where the courts of justice are closed in consequence of insurrection or rebellion, are not within the express terms of any such exception. . . .' The court then said :

" ' Total inability on the part of an enemy creditor to sustain any contract in the tribunals of the other belligerent exists during war, but the restoration of peace removes the disability, and opens the doors of the courts. Absolute suspension of the right, and prohibition to exercise it, exist during war by the law of nations, and if so, then it is clear that peace cannot bring with it the remedy if the war is of much duration, unless it also be held that the operation of the statute of limitations is also suspended during the period the creditor is prohibited, by the existence of the war and the law of nations, from enforcing his claim. Neither laches nor fraud can be imputed in such a case, and none of the reasons on which the statute is founded can possibly apply, as the disability to sue becomes absolute by the declaration of war, and is a conclusion of law. 2 Wildm. *Int. Law*, 17. Ability to sue was the status of the creditor when the contract was made, but the effect of war is to suspend the right, not only without any fault on his part, but under circumstances which make it his duty to abstain from any such attempt. His remedy is suspended by the acts of the two governments and by the law of nations, not applicable at the date of the contract, but which comes into operation in consequence of an event over which he has no control.

. . . . . .

" '. . . Unless the rule be so, then the citizens of a state may pay their debts by entering into an insurrection or rebellion against the government of the union, if they are able to close the courts, and to successfully resist the laws, until the bar of the statute becomes complete, which cannot for a moment be admitted. Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period.' *Hanger* v. *Abbott*, *supra.*

" In *Brown* v. *Hiatts*, 15 Wall. 177, 21 L.Ed. 128, the plaintiff, a citizen and resident of Virginia, loaned money to the defendant, a resident of Kansas, in 1860. The defendant gave a mortgage on Kansas land, due on 29 May 1861. The war broke out on

27 April 1861. It was held that the period of the war must be excluded in the compilation of the time during which the statute of limitations ran against the action. The court said: ' Statutes of limitation, in fixing a period within which rights of action must be asserted, proceed upon the principle that the courts of the country where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor. The principle of public law which closes the courts of a country to a public enemy during war, renders compliance by him with such a statute impossible. As is well said in the recent case of *Semmes* v. *Hartford Insurance Company*, " The law imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other." '

" The case of *Metropolitan National Bank of New York City* v. *Gordan*, 1872, 28 Ark. 115, is of special interest. The plaintiff brought suit in the Arkansas court on a contract dated 16 April 1860 and payable in the city of New Orleans ten months after date. Suit was brought on 6 March 1872. The defendant pleaded the statute of limitations. The plaintiff replied that she was a citizen of the state of New York and that the courts of Arkansas were closed from 1861 to 1865 by reason of the war. Judgment in the lower court was for the defendant. Upon appeal the Arkansas Supreme Court referred to the case of *Bennett* v. *Worthington*, 24 Ark. 487, which had held that when a statute of limitations once begins to run no subsequent disability will stop it and that the court could make no exception which was not provided for in the statute and that since the closing of the courts in time of war was not covered by a statutory exception the statute of limitations continued to run during the war. This case was expressly overruled on the authority of *Hanger* v. *Abbott*, *supra*. After reviewing other cases by the United States Supreme Court, the Arkansas court said that the United States Supreme Court seemed: '. . . with entire unanimity, to have fully settled the law that, under modern international law and commercial custom, upon the breaking out of a war, all contracts and rights between belligerents are suspended, and upon the restoration of peace the parties are restored to their rights and remedies as they existed at the commencement of hostilities.'

" The judgment of the lower court was reversed.

" The foregoing decisions and many others have firmly established the principle of international law that war suspends the statute of limitations as to alien enemies residing in enemy territory and that the rule suspending the running of limitations during the war is one of international law which the courts attach to or read into statutes of limitations though it is not expressed in them. The rule as stated is fully set forth by the annotator in 137 A.L.R. at page 1454, and that text is supported

Case No. 152 *Contd.* by a great mass of federal and state decisions. Among other cases, see: *Ex parte Colonna*, 314 U.S. 510, 62 S.Ct. 373, 86 L. Ed. 379; *The Protector*, 9 Wall. 687, 19 L. Ed. 812; *Levy* v. *Stewart*, 11 Wall. 244, 20 L. Ed. 86; *Ross* v. *Jones*, 22 Wall. 576, 22 L. Ed. 730; *Arnold* v. *Ellison*, 1929, 96 Pa.Super. 118; *Amy* v. *City of Watertown*, 130 U.S. 320, 9 S.Ct. 537, 32 L. Ed. 953; *H. P. Drewry, S.A.R.L.* v. *Onassis*, 266 App.Div. 292, 42 N.Y.S. 2d 74; *Industrial Commission of Ohio* v. *Rotar*, 124 Ohio St. 418, 179 N.E. 165; *Inland Steel Co.* v. *Jelenovic*, 84 Ind.App. 373, 150 N.E. 391; *Wall* v. *Robson*, 2 Nott & McC., S.C., 498; *Porter* v. *Freudenberg*, 1 KB 857; 34 Am.Jur., Limitation of Action, §§ 243, 244, pp. 199 to 201; *Rothbarth* v. *Herzfeld*, 179 App.Div. 865, 167 N.Y.S. 199. . . .

" In the preceding discussion we were dealing with the suspension by war of ordinary statutes of limitation which affect the remedy rather than the right. *Evans* v. *Finley*, 166 Or. 227, 111 P.2d 833, 133 A.L.R. 1318. We next consider the bearing of the rules of international law upon cases in which a statute has created a right and has fixed the time within which action upon that right must be brought. Such statutes generally contain no express provision for the suspension of the running of the limitation, and the common law rule is that the writ must affirmatively show that the action was brought within the statutory period. *State ex rel. Bowles* v. *Olson*, 175 Or. 98, 151 P.2d 723; *Rosell* v. *State Industrial Accident Comm.*, 164 Or. 173, 95 P.2d 726. Nevertheless, in the light of the principles of international law as above set forth, the courts have, as a matter of statutory construction, held that it was not the legislative intent to restrict the time within which an action may be brought, to the period limited in the statute when the law which authorizes suit within a given period of time also prohibits the bringing of such suit by reason of the intervention of war. In *Frabutt* v. *New York, Chicago & St. Louis R. Co.*, D.C., 84 F. Supp. 460, 462, action was brought under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 *et seq.* A state of war existed between the United States and Italy from 11 December 1941 to 6 September 1947. On 31 December 1942 the workman suffered an industrial accident from which he died. The administrator sued for the benefit of the Italian widow on 12 July 1948. The statutory period within which suit could be brought was three years. The defendant moved for summary judgment upon the following grounds:

' 1. That the Complainant fails to state a claim against defendant upon which relief can be granted.

' 2. There is no allegation in the pleadings that this action was commenced within three years from the date the cause of action accrued.'

" Thus the objection was based, not only upon the lapse of the statutory period, but also upon the ground of a failure to plead that the action had been commenced within the required time. The court said:

" ' It appears by a firmly established principle of international law that the existence of a state of war between two countries or powers is effective to suspend the running of statutes of limitations as between the citizens of such countries or powers at war, or, as it has been otherwise stated, war suspends the statute of limitations against alien enemies resident in enemy territory. On the restoration of peace all rights suspended during hostilities, or which remain dormant, are revived, and the statute of limitations again becomes operative. The rule suspending the running of limitations during war is one of international law which the courts attach to, or read into, statutes of limitations, though it is not expressed in them; and it is applicable irrespective of whether the limitation in the particular statute of limitations is considered to be a limitation of the right or liability, or of the remedy. . . .

" ' The reason for this modern rule lies in the fact that during the war the courts of either belligerent country are necessarily closed to the citizens of the other, since the law of nations forbids any intercourse between citizens of belligerent powers. Accordingly taking into consideration that statutes of limitations, in fixing a definite period for the bringing of suits, proceed upon the principle that the courts where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor, and in view of the fact that the law of nations which closed the courts to alien enemies renders compliance with the statute impossible, it is only fair and just that the operation of statutes of limitations should be suspended; an alien enemy's right to sue being suspended by circumstances beyond his control, which, in fact, create a positive duty on his part to refrain from pursuing his right of action. 137 A.L.R. page 1454 *et seq.*; *The Kaiser Wilhelm II*, 3 Cir., 246 F. 786, L.R.A.1918C, 795.

. . . . . .

" ' War can only end by treaty of peace between the belligerent countries, and while war continues the courts of each belligerent are closed to nationals of the other country. Statute of limitations will not be permitted to run against an alien enemy. *First National Bank of Pittsburgh* v. *Anglo-Oesterreichische Bank, supra* [3 Cir., 37 F.2d 564]; *Siplyak* v. *Davis*, 276 Pa. 49, 119 A. 745; *Zeliznik* v. *Lytle Coal Co.*, 82 Pa.Super. 489; *Borovitz* v. *American Hard Rubber Co.*, D.C., 287 F. 368.

. . . . . .

" ' The suspension of the remedy during war is so absolute that the courts could not have granted permission or authority to take testimony in the Republic of Italy which would have been an absolute necessity in order for the widow and her

Case No. 152 *Contd.* children to prosecute their right to recover. It, therefore, appears to me that when the reason for the suspension ceases, the right to prosecute revives and the fact that the right had been suspended in the war between United States and Italy should not constitute a disability or deprive the widow and children to recover if such right exists. To hold otherwise, the principles of the Constitution of the United States would be destroyed. It would be basically unsound and work a disallowance of the equal protection of the laws of this country to all persons, regardless of their previous condition of servitude or alienage.

" ' All statutes of limitations are based on the assumption that one with a good cause of action will not delay bringing it for an unreasonable period of time ; but, when a plaintiff has been denied access to the courts, the basis of the assumption becomes destroyed.'

" In *Siplyak* v. *Davies*, 276 Pa. 49, 119 A. 745, 746, the Austrian widow of a workman who was killed in an industrial accident brought a claim under the Pennsylvania Compensation Act, 77 P.S.Pa. § 1 *et seq.* The statutory limit upon the right to sue was one year. A claim was filed after the expiration of one year. The court held that the statute limiting the right was tolled during the period of the war between the United States and Austria. The court said :

" ' A further principle, however, is recognized by the courts, which is applicable to the present proceeding. In case of the existence of an emergency, such as the declaration of war, and the statute makes no provision for such emergency, it may be reasonably implied that, if the Legislature had had in mind such contingency, it would have made provision to meet it. This implied suspension of the statute may be justified on the ground of public necessity due to the fact, for example, that during the existence of war a total inability exists on the part of the citizens of the belligerent countries to carry on business intercourse with each other, and necessarily an absolute suspension of all rights and a prohibition to exercise them exists during that time, and, as this state of facts was brought about by circumstances over which the individual had no control, it is only fair that on termination of hostilities and the declaration of peace both the right and the remedy therefor should be returned to the parties.

. . . . . .

" ' We find nothing in the recent federal legislation known as the Trading with the Enemy Act of October 6, 1917, 40 Stat. 411 (U.S.Comp.St.1918, U.S.Comp.St.Ann.Supp.1919, §§ 3115 1/2 a–3115 1/2 ff, 3115 1/2 g–3115 1/2 j [50 U.S.C.A.Appendix, §§ 1–19]), which in any way indicates an intention of Congress to change the existing law applicable to dealings between citizens of the United States and those countries with which we were at war. On the contrary, section 8 of that act (section

3115 1/2 dd [50 U.S.C.A.Appendix, § 8]), dealing with contracts with the enemy and providing for the suspension of the statute of limitations between parties neither of whom was an enemy, or an ally of an enemy, contains the express provision that—

" ' " Nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all . . . cases where such suspension would occur under existing law."

" ' Here is an express recognition of the fact that under existing laws the statute is suspended as between American citizens and the citizens . . . of other countries, who were neither an enemy, nor an ally of an enemy, but against or in favor of whom the existence of war naturally made it difficult to enforce contractual or other obligations.'

" Other cases supporting the same rule are as follows: *Borovitz* v. *American Hard Rubber Co.*, D.C., 287 F. 368; *Colorado Fuel & Iron Co.* v. *Industrial Commission*, 73 Colo. 579, 216 P. 706; *Industrial Commission of Ohio* v. *Rotar, supra*, 124 Ohio St. 418, 179 N.E. 135; and see *The Kaiser Wilhelm II*, 3 Cir., 1917, 246 F. 786, L.R.A. 1918C, 795. . . .

" Having considered the effect of war as suspending the operation of statutes which limit the remedy and of other statutes which ordinarily limit or terminate the right, we now approach one step closer to the immediate issue. The Oregon statute authorizing suit to recover escheated property within ten years presents a situation similar to both of the two categories considered above, but not identical to either. Since the escheat statute in legal effect authorizes a suit against the state, it is, of course, a ' consent ' statute. Being such, the legislature could impose terms and conditions upon those in whose favor it yielded the needed consent. The question, however, as to the scope of the conditions imposed, is one of statutory construction based on a consideration of the legislative intent and it is to be resolved in the light of the extraordinary conditions created by war. Unlike the cases under statutes such as the Workmen's Compensation Act in which a new right is both created and limited, the statute concerning petitions for refund of escheats ' does not create a new right or a new cause of action.' *Haley* v. *Sprague*, 166 Or. 320, 325, 111 P.2d 1031, 1033. The statute merely enables a purported heir to sue the state for recovery of property which he claims he owns. The construction of the limitation in the consent statute presents an issue more closely resembling that involved in the cases in which it is held that war tolls ordinary statutes of limitation. In both, the right exists. In one the remedy is limited by a legislative mandate; in the other, the period within which the state consents to be sued is so limited. No reason is perceived why the court should not adopt a uniform

Case No. 152 *Contd.* rule of construction for both statutes when the intervention of war is asserted as ground for suspension of the running of the limitation. It is true that there is no provision in the consent statute for the suspension thereof, but the same is true concerning the cases in which it is held that war suspends statutes which create rights unknown to the common law and which limit both right and remedy. When the state consents to be sued, and then by reason of its recognition of rules of international and common law, closes its courts to the litigant, thereby denying the privilege which it granted, some construction must be sought which will avoid absurdity. It is unbelievable that the same hand which gives should also be construed to take away. . . .

". . . We conclude that by reason of the principles of international law the courts of this country will treat as suspended the time limitation in a consent statute in a suit by an alien enemy during a period that the courts were closed to the claimant by reason of war. Limitation statutes of all types were enacted in contemplation of the prevalence of peace and the authorities indicate that consent to sue means consent to sue in a court which is open for suit. In the absence of an express and unequivocal declaration to that effect, we should not presume that the law both grants and withholds the permission to sue. . . .

" Most of the cases thus far considered relate to suits by an alien enemy. The defendants contend that the claimants were subjects of the Kingdom of The Netherlands with which the United States was not at war, and that they were therefore not alien enemies. The *Osbourne case*,[1] however, suggests the answer. In that case, the running of the statutory limitation was suspended for the benefit of an American citizen imprisoned by the enemy. As indicated in the Osbourne case, it would be the height of unreasonableness to grant redress to a Japanese alien enemy by reason of the war at the same time that we denied it to a citizen. The identical question was considered in a lengthy opinion in the House of Lords. In *Sovfracht* v. *Van Udens Scheepvaart*, All E.R., Vol. 1 (1943) 76, the court reviewed British and American decisions and held that a Dutch company, with principal place of business in Rotterdam, was in the position of an alien enemy as to whom the courts were closed by reason of the belligerent occupation of the Kingdom of The Netherlands by Germany during the second World War. In the course of a lengthy opinion, Viscount Simon, L. C., said :

" ' It is not irrelevant to bear in mind the reason why a resident in enemy-occupied territory is in certain circumstances subject to the same disability as a resident in enemy territory. Lord Reading, L. C. J., in *Porter* v. *Freudenberg*

---

[1] [*Osbourne* v. *United States*, 164 F. 2d 767.]

[[1915] 1 K.B. 857], referring to the denial to alien enemies of a right to sue, said at p. 867:

" 'This law was founded in earlier days upon the conception that all subjects owing allegiance to the Crown were at war with subjects of the state at war with the Crown, and later it was grounded upon public policy, which forbids the doing of acts which will be or may be to the advantage of the enemy state by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy state.'

" 'This consideration equally applies to a claim sought to be established in our courts by a resident in enemy-occupied territory, for, if the claimant succeeds, an asset in the form of an award or a judgment is created which the occupying power can appropriate and which is calculated to increase the enemy's resources.'

" We hold that, by reason of the belligerent occupation of the Kingdom of The Netherlands by Germany, the plaintiffs, who were residents within, and subjects of that kingdom, were in the position of alien enemies, and as such, were barred from bringing suits in the courts of this state, and that the same facts which closed the courts to them, also operated to suspend the running of the period of limitation for their benefit. The closing of the courts to persons in the position of alien enemies is not the only limitation upon their rights. From the Basic Field Manual, Rules of Land Warfare of the War Department of the United States, we read the following at Chapter 7, section 215, page 60: 'All intercourse *between the territories occupied by belligerent armies*, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule to be observed without special proclamation.' (Italics ours).

" The conclusion at which we have arrived is supported in the monumental work of Charles Cheney Hyde on *International Law*, Vol. 3, where he says, at page 1699: 'It is inconsistent with a state of war that the inhabitants within territory *controlled* by one belligerent should hold intercourse with those within territory controlled by the enemy, primarily because of the danger of the communication of information of military or political value, and secondarily, because of the neutralizing effect of any commercial transactions tending to increase the resources of the enemy upon hostile operations undertaken against it. . . .' (Italics ours.)

" Again the author says at 1715: 'A consequence of closing the courts to a class of alien enemies is to remove from them certain penalties which might otherwise be incurred through failure to initiate proceedings during the period of disability. Thus the statute of limitations does not run against such individuals while they are being deprived of their judicial remedies.'

Case No. 152 *Contd.*

" In *H. P. Drewry, S.A.R.L.* v. *Onassis, supra,* 266 App.Div. 292, 42 N.Y.S. 2d 74, it was held that the plaintiff, a French corporation residing in France during the belligerent occupation of that state by Germany, should be considered an alien enemy under the Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 1 *et seq.* The decision relied, not alone upon federal statute, but also upon English and American decisions. See also *Von Hofmannsthal* v. *Wolfe,* 276 App.Div. 223, 93 N.Y.S. 2d 550. . . .

" The final, and perhaps the most vexing question, remains for decision. We must determine between what dates the statute was suspended, and then deduct the period of suspension from the total period which intervened between the accrual of the cause of action and the institution of the present proceedings. We can then determine whether the net balance of time is more or less than ten years. The significant dates may be listed as follows :

14 April 1932. Net proceeds of estate paid by the administrator to the State Treasurer for the State Land Board. On this date the 10-year statute began to run.
[10] May 1940. Germany invades The Netherlands.
11 May 1940. The President of the United States proclaims the existence of a state of war between Germany and the Kingdom of The Netherlands. 54 U.S. Statutes at Large, part 2, page 2703, No. 2405.
18 May 1940. Belligerent occupation of the Netherlands completed and supreme civil authority assumed by decree of Chancellor Hitler. Lemkin, Axis Rule in Occupied Europe, page 446 ; *Sovfracht* v. *Van Udens Scheepvaart, supra.*
11 December 1941. State of war between the United States and Germany declared by joint resolution of Congress. 55 U.S. Statutes at Large, part 1, page 796.
8 May 1945. Unconditional surrender of the German armies in The Netherlands and the end of belligerent occupation.
1 July 1946. Plaintiffs' petition for refund of escheated estate was filed.
31 December 1946. The President of the United States proclaims the cessation of hostilities of World War II. Proclamation No. 2714, 50 U.S.C.A. Appendix, § 601 note.

" In the plaintiffs' opening brief they were satisfied to contend that the period of suspension ended on or about 8 May 1945 when belligerent occupation ended and that thereafter the statutory limitation would again run. In their reply brief, however, it is suggested that the period of suspension continued until 31 December 1946, the date of the President's proclamation that hostilities in World War II had ended. With this second contention we cannot agree. It is generally held that the courts of this country are closed to alien enemies who are citizens or subjects of a country at war with the United States and that they remain closed until the making of the treaty of peace, or at least until Congress, by joint resolution, declares the termination of the state of war. *Frabutt* v. *New York, Chicago & St. Louis R. Co.*; *Arnold* v. *Ellison*; *MacLeod* v. *United States*; *Inland Steel Co.* v. *Jelenovic*; *Colorado Fuel & Iron Co.* v. *Industrial Commission*; *Borovitz* v. *American Hard Rubber Co.*; *Industrial Commission of Ohio* v. *Rotar*, all *supra*. It is unnecessary to decide the disputed question as to whether war can be ended by unilateral act, or only by treaty, because the rule applicable to German citizens or subjects cannot be applied in the case at bar. The plaintiffs were subjects of the Kingdom of The Netherlands with which the United States maintained diplomatic relations. There could be no treaty of peace or declaration of the end of hostilities between the United States and the Kingdom of The Netherlands because the two countries were never at war. The courts were closed to the plaintiffs solely because of the fact that Germany was in belligerent occupation of their country. For the reasons explained in the cases, the plaintiffs were treated as alien enemies, but upon termination of the occupation, we find no reason for holding that communications between persons in The Netherlands and others in this country were forbidden or that the courts of this country were closed to the plaintiffs. Plaintiffs were in a position analogous to that of the plaintiff in *Osbourne* v. *United States, supra*. The running of the statute was suspended for his benefit during his imprisonment by the enemy. No one would argue that the suspension continued after he was returned to the United States merely because the war with Japan had not ended. We hold that the suspension of the statutory period ended with the unconditional surrender of the German armed forces and the liberation of Holland on 8 May 1945.

"Between 14 April 1932, when the statute commenced to run, and 1 July 1946 when the suit was filed, 14 years, 2 months and about 17 days had elapsed. From 11 December 1941 to 8 May 1945, that is, from the commencement of war between the United States and Germany until the liberation of The Netherlands, the running of the statutory period was clearly suspended. That period, however, amounts to only three years and a little less than five months. If that be the extent of the suspension, it would follow that the ten-year period had fully run before the complaint was filed. The plaintiffs' case therefore rests upon their contention that 'the period of suspension could certainly start no *later* . . . than sometime in May, 1940, when Germany invaded The Netherlands.' If the running of the statutory limitation was suspended from 18 May 1940 until 8 May 1945, it would follow that the filing of the complaint was well within the ten-year period.

"The plaintiffs rely upon several decisions from the courts

Case No. 152 *Contd.*

of New York. They are, however, distinguishable from the cases which we have previously cited. In that state, the questions concerning the suspension of statutes of limitation by reason of war have been treated as strictly controlled by specific statute, leaving no room for construction. Before its amendment, to which we will later refer, section 27 of the Civil Practice Act provided in substance that an alien subject or citizen of a country at war with the United States was under a ' disability ' and that the ' time of the continuance of the disability is not a part of the time limited for the commencement of the action.' But, it also provided, in section 28, that the ' disability ' must exist when the right of action accrued. In treating war as giving rise to a disability, the New York court arrived at a different construction from that applicable to O.C.L.A. §§ 1–217 and 1–220, by reason of the difference in the wording of the New York and Oregon statutes. In *Nathan* v. *Equitable Trust Co.*, 250 N.Y. 250, 165 N.E. 282, the New York court distinguished *Hanger* v. *Abbott, supra,* because the latter case was decided on the ground of international law and without reference to any statute. The court then held under the statute that the ' disability ' of war was like that of insanity and must exist when the cause of action accrued. Under this decision, if the statute of limitations once began to run, it continued, notwithstanding the intervention of war.

" In *Gallewski* v. *H. Hentz & Co.*, 276 App. Div. 219, 93 N.Y.S. 2d 546, 548, on which the plaintiffs rely, the New York court again gave no consideration to the rules of international law. It pointed out that under the Nathan case, the duration of the war could not have been excepted from the limitation period except for the fact that sections 27 and 28 of the Civil Practice Act had been amended. The court held that the ' amendatory act eliminated the previous requirement that the war shall have been in progress when the cause of action accrued, in order to toll the statute of limitations.' The amendatory act was held applicable and the plaintiff, as administrator of one Gutmann who had been a citizen and resident of The Netherlands, but who was arrested and deported by Germany during the occupation, was held to be one as to whom the statute of limitations was tolled. The 1949 amendment to section 27 provided that the period of war should not be a part of the time limited for the commencement of the action, ' whether the cause of action arose during or prior to the period of such disability. . . .' Laws of New York, 1949, ch. 326. In 1949 the New York legislature also amended section 13 of the Civil Practice Act by adding the following with reference to causes of action arising outside of the state: '. . . Where such cause of action, whether originally accrued in favor of a resident or non-resident, arose in a foreign country with which the United States or any of its allies was then or subsequently at war, or in territory then or subsequently occupied by the government of such foreign country, the period between the commencement of the war, or the occupation of such country, and the termination of hostilities with such country, or the termination of such occupation, is not a part of the time limited in this article for commencing the action. . . .' Laws of New York, 1949, ch. 855.

" The plaintiffs rely upon *Von Hofmannsthal* v. *Wolfe*, *supra*, 276 App.Div. 223, 93 N.Y.S. 2d 550, 554. That case was decided upon the authority of the 1949 amendments above cited. In that case the court said : ' The chronology of events may briefly be summarized as follows : The claim arose in Austria on March 9, 1938. That country was occupied by Germany on March 11, 1938. The World War started on September 1, 1939. The United States entered the World War on December 8, 1941, and the action was commenced on May 11, 1949. The hostilities ended on May 8, 1945. The statute of limitations would be tolled for the period from September 1, 1939, to May 8, 1945, and this would be more than sufficient to prevent the six-year statute of limitations from operating as a bar.'

" Again we quote : '. . . It is clear from these amendments that the Legislature wanted to afford some measure of protection for a period arising before the United States entered the World War, *i.e.*, from September 1, 1939. It is possible that it was the intention of the Legislature to extend the benefits of the tolling provisions to claims arising in what turned out to be enemy occupied territory even before that date, for example, those arising in Austria during the Anschluss or after March 11, 1938. As has been stated, it is unnecessary to decide that last point on this appeal, for if we assume that the tolling period, for claims arising in enemy occupied countries, begins from the time that the first ally of the United States entered the war, that is, from September 1, 1939, the period of tolling is sufficient, in the instant case, to prevent the six-year New York Statute of limitations from operating as a bar.'

" Thus it appears that the case was decided strictly on the basis of special New York statutes without any consideration of the principles of international law. The 1949 amendments to the New York Civil Practice Act manifest an impressive legislative policy in favor of the general principles advocated by the plaintiffs in the case at bar. The amendment to section 17 of that act brought the legislative policy of the state into harmony with *Hanger* v. *Abbott*, *supra*, but, for our present purpose, the question is whether the 1949 amendment to section 13, *supra*, or the decisions thereunder, can be considered as declaratory of any rule of international law. The many cases which we have earlier reviewed establish the rule that a person residing in The Netherlands when it was in belligerent occupation by Germany is in the position of an alien enemy from the

Case No. 152 *Contd.*

outbreak of war between the United States and Germany until the liberation of The Netherlands. The New York statute went beyond the holdings of any of these cases when it provided for the suspension of statutes of limitation as to certain causes of action for a greater period, namely, for the period between the occupation of a country by a state with which the United States or any of its allies was then, or subsequently, at war, and the termination of such occupation. Furthermore, even if the New York cases were adopted as declaratory of rules of international law, they would not apply to the pending case. Section 13 of the New York Civil Practice Act refers to causes of action which arise outside of the state of the forum. The cause of action in the pending litigation arose in Oregon. The *Von Hofmannsthal* case is not in point.

" The plaintiffs draw some comfort from language employed by Justice Brandeis in *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione*, 248 U.S. 9, 39 S.Ct. 1, 2, 63 L. Ed. 100. In that case the controversy was between British and Austro-Hungarian corporations. The case was originally decided before 6 April 1917, the date on which the United States entered the first World War, but the final decision of the United States Supreme Court was made after that date. The Supreme Court took notice of the change of conditions which had occurred and held that by reason of such change of conditions, intercourse was prohibited between subjects of Austria-Hungary who were then alien enemies, and persons in the United States. The suit was continued until the restoration of peace. In addition to the ruling on the illegality of such intercourse, the court said : ' And we take notice of the fact that free intercourse between residents of the two countries has been also physically impossible.' It is one thing for a court to take judicial notice of the fact that free intercourse was physically impossible between two countries which are at war, but it would be quite another thing for this court, in the pending case, to take judicial notice of the impossibility in fact of intercourse between a resident subject of The Netherlands and persons in the United States after the belligerent occupation of The Netherlands by Germany and before the United States declared war on Germany. There is nothing in the Watts case which indicates that physical impossibility of intercourse with persons in the United States because of war conditions in a foreign country would toll a domestic statute of limitations when the United States was not involved in any such war, and we find no judicial support for any such rule.

" In *Sadowski* v. *Hubbard Steel Foundry Co.*, 100 Ind.App. 233, 193 N.E. 676, 677, an action was brought under the Workmen's Compensation Act. There was a two-year statute of limitations. For reasons which are not clear, the court held that the application was not filed within two years after the death of the decedent, which occurred on 23 January 1919. The defendant pleaded the statute of limitations to which the plaintiffs filed a reply closely resembling the pleading of the plaintiff in the case at bar. It alleged that the plaintiff was at all times a resident of Poland, and that ' at the time of her husband's death and since said time has the State of Poland been engaged in war and been the scene of war. That as a consequence it was impossible to communicate with private persons in this country.' The armistice which provided for the evacuation of occupied countries and which ended hostilities of World War I was signed on 11 November 1918, before the death of the workman. It seems clear that the plaintiff could not have been deemed an alien enemy at the time the cause of action accrued. The court said : ' We deem it expedient to note that appellants attempted to prove the allegations of their second paragraph of reply which allegations are set forth herein, and to note that appellants contend that the facts so alleged and proven suspended the operation of the statute of limitations against appellant Karolina Sadowski, and to note that appellants cite *Inland Steel Co.* v. *Jelenovic* (1925), 84 Ind.App. 373, 150 N.E. 391, 392, as authority for their said contention. In that case this court held " that war suspends the operation of the statute of limitations against *alien enemies residing in enemy territory*". In the cause at bar appellants did not allege nor attempt to prove that appellant Karolina Sadowski was an " alien enemy residing in enemy territory " at any time during the two years immediately following decedent's death, and therefore the case of *Inland Steel Company* v. *Jelenovic, supra*, is not applicable here.'

" This case appears to be authority for the proposition that the physical impossibility of commercial intercourse by reason of the existence of a state of war does not suspend statutes of limitations or close the courts of this country except when the war is one in which the United States is involved and the litigant is in the position of an alien enemy.

" In *Siplyak* v. *Davis, supra* [276 Pa. 49, 119 A. 747], the court referred to section 8 of the Trading with the Enemy Act of October 6, 1917, 40 Stat. 411, 50 U.S.C.A. Appendix, §§ 1–19. The statute provided for the suspension of the statute of limitations in certain contract cases, and then provided : ' Nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all . . . cases where such suspension would occur under existing law.'

" After quoting the above provision, the court said : ' Here is an express recognition of the fact that under existing laws the statute is suspended as between American citizens and the citizens of those countries with which we were at war, but would not be suspended between our citizens and the citizens of other countries, who were neither an enemy, nor an ally of

Case No. 152 *Contd.* an enemy, but against or in favor of whom the existence of war naturally made it difficult to enforce contractual or other obligations.'

" A careful search has failed to discover any act or declaration of the legislative or executive branches of this government of which we could take judicial notice and which forbade communications by mail between subjects of the Kingdom of The Netherlands and persons in this country prior to December 1941 when the United States declared war against Germany. In the earnest search for any record of which we might take judicial notice, we directed an inquiry to the State Department in the following words: ' Is there a record of any official proclamation or declaration by the State Department of the United States concerning the impossibility in fact or law of communications or intercourse by citizens of The Netherlands with persons within the United States or with neutral countries in general, during the period of the belligerent occupation of The Netherlands and prior to the declaration of war between the United States and Germany ? '

" An answer signed, ' For the Secretary of State ' by the Acting Legal Adviser, stated that parcel post shipments to The Netherlands were suspended 21 May 1940, but that ' there were no official statements of the Department concerning communication between American citizens and residents of The Netherlands.' We are reluctantly forced to the conclusion that, although the belligerent occupation of The Netherlands by Germany, prior to the entry of the United States into the war, probably did render communications with the United States difficult in fact, nevertheless, there was no law rendering such communication illegal and there is no reason to believe that the courts within the United States were closed to the plaintiffs during the period in question. If follows that, although the statutory limitation was suspended from 11 December 1941 to 8 May 1945, the ten-year period had fully run before the suit was commenced on 1 July 1946.

" It is of interest to note that in a case now pending in the District Court of Appeal of California, the Attorney General of the United States has filed a brief as amicus curiae which supports the legal conclusions at which we have arrived. The legal issues in that case are the same as here, though the facts are different. *In the Matter of the Estate of Gerasimos Caravas*, California District Court of Appeal, 3 Civil No. 7985.

" The case at bar is one of great hardship, and, we fear, some injustice. There is little equity in the claim of the defendants. The plaintiffs, with due diligence, filed their first complaint within the ten-year period, and the service in that case was quashed upon highly technical grounds. However, we are unable to find any rule of international law which would extend the limitation of the statute for a period long enough to warrant a holding in favor of the plaintiffs. The remedy, if any there be, must rest with the legislature."

[Reports: 195 Or. 412; 238 P. 2d 225.]

NOTE.—A petition for rehearing was denied, 195 Or. 412, 246 P. 2d 585 (1952).

See also *In re Caravas' Estate*, 40 Cal. 2d 33, 250 P. 2d 593, 596 (1952), where the Supreme Court of California, distinguishing *Peters* v. *McKay*, held the statute of limitations to have been tolled (barred). ". . . (I)t is an established principle of international and municipal law", the Court noted, "that a statute of limitation is tolled during the period when the existence of a state of war prevents access to the courts, whether or not the particular statute of limitation expressly provides for such suspension thereof." See, however, *Pass* v. *McGrath, Attorney General of the United States*, 192 F. 2d 415 (1951), *certiorari* denied, 342 U.S. 910, 72 S.Ct. 302, 96 L. Ed. 681 (1952). In support of the holding in the *Caravas* case, see *Marcos* v. *United States*, 102 F. Supp. 547, 122 Ct. Cl. 641, 106 F. Supp. 172 (1952), and the cases there cited (*International Law Reports*, 1952, Case No. 119), as well as *Gruss* v. *Nettel*, 104 N.Y.S. 2d 329, 200 Misc. 174 (1951).

War—Effects of—Right of Enemy Government to Sue—Enemy Government Subsequent to Termination of Hostilities. Case No. 153

JAPANESE GOVERNMENT *v.* COMMERCIAL CASUALTY INSURANCE CO.

United States, District Court, Southern District, New York.
November 20, 1951.

THE FACTS.—An action was brought by the Japanese Government against the Frederick Mohagany Company for breach of contract and fraud and misrepresentation, and against the Commercial Casualty Insurance Company on a bond executed by it guaranteeing, in part, the faithful performance by Frederick Mohagany Company of the contract in suit. The defendants moved to dismiss the action, alleging that the Court lacked jurisdiction because the plaintiff was at the time of the commencement of the action a non-resident alien enemy and was not a Government recognized by the Government of the United States. The relevant facts, bearing on the situation after the termination of hostilities against Japan in the Second World War, appear from the *Held* below.

Held: that the Japanese Government could maintain the action. The Court said:

" We take judicial notice that war was declared upon Japan by the United States on December 8, 1941, Declaration of War Against Japan, 55 Stat. 795, 50 U.S.C.A. Appendix note preceding Section 1, and that the proclamation ending hostilities

Case No. 153 *Contd.* provided that the state of war continued to exist, Proclamation of the End of Hostilities, No. 2714, 12 Fed. Reg. 1, 50 U.S.C.A. Appendix, § 601 note. This state of war will continue, unless the President proclaims an earlier date, until a peace treaty is ratified by the Senate of the United States and ratifications have been exchanged. Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 2. The recent treaty signed by representatives of the United States Government and the Japanese Government on September 8, 1951 has not as yet been ratified. There has been no presidential proclamation declaring the war ended. Since the cessation of actual hostilities in September, 1945, between the Allied Powers and the Japanese, Japan has been occupied by the Allied Powers and the Supreme Commander for the Allied Powers has had complete supervision and direction of the Japanese Government. The United States was one of the Allied Powers participating in the appointment of the Supreme Commander and agreeing to his authority.

" We take judicial notice also that the armed forces of the United States did not enter Japan as conquerors to levy and exact tribute or to ravish and lay waste the homeland of a defeated people. It has been declared policy of the United States to rehabilitate and re-establish Japan as one of the nations of the world to the end that it should ultimately take its place among the family of democratic nations, where the natural rights and dignity of man are protected and preserved. Japan was and has continued to be occupied, not for purposes of subjugation, annexation or destruction. The occupation has been, essentially, provisional and temporary ; Japan has continued as a sovereign with its rights and powers of sovereignty limited only by the directives of the Supreme Commander.

" For the purposes of this motion, we accept the facts pertaining to the contract in suit and to this litigation, set forth in the complaint as well as in the letter of the Department of State, dated October 4, 1951, (copy of which is annexed hereto, 101 F. Supp. 250). It is sufficient to here note that the contract in suit and the bond given by Commercial were specifically ' approved ' by the Supreme Commander and that the filing of this suit was likewise authorized by the Supreme Commander.

" We also accept as the fact (as appears in the letter of the Department of State, dated October 4, 1951), that

" '. . . it has been the policy of the United States Government since the end of hostilities to encourage and to authorize and to permit United States nationals to enter into contracts with Boeki Cho to buy or sell wares and merchandise if such transactions were approved by the Supreme Commander since such trade was necessary for the economic stabilization of Japan ; ' and,

" ' that since the end of hostilities, the Allied Powers, of which the United States was one, through the Supreme Commander, encouraged exports from and imports to Japan and the accumulation of dollar balances as the result thereof in order to assist Japan in the redevelopment of her international trade and thereby to reduce the requirement for aid from the United States Government from appropriations for government and relief in occupied areas.'

" We also accept the statement that the contract in suit, ' Contract JI–40239 referred to above did not give aid and comfort to the Japanese Government in the prosecution of any war effort against the United States but on the contrary was entered into pursuant to the policy of the United States Government to encourage trade between the Japanese Government and United States nationals and that the said contract was not opposed to any interests of the United States Government ' (letter of Oct. 4, 1951).

" We have then an action filed on August 17, 1951, after cessation of hostilities but before the signing of ratification of a treaty of peace, and asserted claims based upon a contract approved on April 21, 1949 by the Supreme Commander for the Allied Powers.

" It is settled that friendly foreign governments are not to be denied the privilege of suing in our courts. *Russian Government* v. *Lehigh Valley R. Co.*, D.C., 293 F. 133 ; *Russian Republic* v. *Cibrario*, 235 N.Y. 255, 257, 139 N.E. 259. Whether a foreign government is in fact recognized is a political, not a judicial question. When recognition, even for the limited purpose of granting it permission to function and trade as a foreign government with our nationals and within our borders, has been granted by the political departments of our government, it is not for the judiciary to create barriers which thwart and defeat such action. Although the courts are ' free to draw for themselves its legal consequences in litigations pending before them ', *Guaranty Trust Co.* v. *United States*, 1937, 304 U.S. 126, 138, 58 S.Ct. 785, 791, 82 L. Ed. 1224, the action of the political departments of the Government in recognizing a foreign government is conclusive.

" ' That at the time of the commencement of this action the Japanese Government was a sovereign government recognized as such by the Government of the United States,' we are informed by the letter of the Department of State of October 4, 1951 (annexed hereto 101 F. Supp. 250). With the recognition of the Japanese Government by the United States there goes acknowledgment that it ' will be permitted to hold its place and rank, in the character of an independent political organism.' Moore, *International Digest*, Vol. 1, p. 72. That ' the government of Japan does not have diplomatic representation in the United States and consequently it does not have an ambassador in this country ' and that the Japanese Government does not have ' consular representation *per se*,' or ' any consular offices

Case No. 153 *Contd.* in the United States,' (letter of Department of State, September 14, 1951, annexed hereto 101 F. Supp. 249), does not alter its status as a sovereign government recognized as such by the United States government. Recognition as a sovereign government may, and not infrequently does, exist independently and in the absence of diplomatic representation.

" The right of any foreign government to sue in our courts, in the absence of treaty granting that right, is based upon the theory of international comity. 'It presupposes friendship. It assumes the prevalence of equity and justice. . . . We do justice that justice may be done in return.' *Russian Republic* v. *Cibrario, supra*, 235 N.Y. 258, 139 N.E. 260. At the time of the filing of this suit, August 17, 1951, the Japanese Government had no right granted by treaty to sue in this court; to sustain this right now we must look to the principles of comity, equity and justice. We do so and conclude that the right should not be denied.

" We have reached this conclusion notwithstanding the fact that the treaty ending the state of war between the United States and Japan has not yet been ratified. It does not seem improper to set one time as the date of the end of war for purposes of trading between the nationals of the two countries, another for purposes of terminating wartime legislation, another for purposes of applying American municipal law and still another for some international situations. War Between United States and Germany, Manley O. Hudson, 39 Harv.L. Rev. No. 8, 1045, June, 1926.

" It is recognized that under common law an alien enemy, whether resident or not, might not maintain an action in our courts, but 'The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy.' *Ex parte Kawato*, 317 U.S. 69, 75, 63 S.Ct. 115, 118, 87 L. Ed. 58.

" This rule has continued with respect to non-resident enemies and the suspension of their rights to prosecute actions in our courts. *Johnson* v. *Eisentrager*, 339 U.S. 763, 776, 70 S.Ct. 936, 94 L. Ed. 1255; *Ex parte Colonna*, 314 U.S. 510, 62 S.Ct. 373, 86 L. Ed. 379. The measure of this suspension of rights is to be found in our common law as it is modified by statute.

" The Japanese Government is deemed, for purposes of this decision, a non-resident, alien enemy (Trading with the Enemy Act, *supra*), and, therefore, subject to all the disadvantages of that status. However, in the common law even there were at times exceptional instances where the rule was relaxed. Thus, in *Sanderson* v. *Morgan*, 39 N.Y. 231, the Court of Appeals wrote, 'In *Mrs. Alexander's* [*Cotton*] case (2 Wall. 404 [17 L. Ed. 915]) it was held, that all the people of any district that was in insurrection against the United States in the late rebellion were to be regarded as enemies, except in so far as, by action of the United States government itself, that relation may have been changed '.

" The rule was applied ' save in exceptional instances, as, for example, where commerce is continued between the nations at war '. *Stumpf* v. *A. Schreiber Brewing Co.*, D.C., 242 F. 80, 82.

" It seems to us that the decision of Justice Washington in *Crawford* v. *The William Penn*, 6 Fed.Cas. page 778, 779, No. 3372, affords an indication of the extent and scope of the exceptional instances in which suit was allowed to be filed. There, a libel was filed for repairs to a vessel chartered by the United States to carry American prisoners of war in the War of 1812 from Jamaica to the United States. The vessel had cleared Jamaica when it was forced to put back for repairs and refitting. Libelants, English subjects, resident in Jamaica, made these repairs. Replication to the libel was filed by claimants alleging that libelants being alien enemies, residing in Jamaica, could not file suit here because England and the United States were then at war. Justice Washington noted the common law rule preventing suits by alien enemies during time of war, but observed that the voyage of The William Penn had been authorized under the rules of war by both belligerents for the transportation of prisoners to the United States and that the repairs to the vessel were made in furtherance of this purpose and to benefit the United States. Justice Washington refused to dismiss the libel, and wrote : '. . . if the contract on which the suit is brought arise directly or collaterally out of a trade licensed by the sovereign authority of the government, in whose courts redress is sought, enemy interest in the subject in controversy will not defeat the action depending in the name of the subject as trustee. . . . the end being licensed, the ordinary legitimate means of attaining that end is considered as being also licensed. . . . where commerce is permitted amongst enemies, contracts, and actions founded upon them, are permitted ; " for who ", (Bynkershoek) asks, " will sell and carry goods to an enemy, without the right of recovering the price of them ? and what hope can there be of recovering that price, if one cannot judicially compel payment from his enemy purchaser ". In cases of this nature, in courts proceeding according to the civil law, the only question is, has the plaintiff a persona standi in judicio ? Can he be heard as a plaintiff in that court ? Bynkershoek, in the above quotations, gives the answer. The right to sue, and to compel payment, is a necessary incident to his right to trade and to contract. This doctrine of Bynkershoek has received the entire approbation of Sir William Scott in the case of *The Hoop*, in which he gives the sense of that learned jurist as amounting to this, that the legality of commerce, and the mutual use of courts of justice, are inseparable. 1 C.Rob.Adm. 168.'

Case No. 153 *Contd.*

" Although Justice Washington writes of the contract upon which suit was filed as arising ' out of a trade licensed by the sovereign authority of the government, in whose courts redress is sought ', we read it not as a ' license ' in the very formal sense in which we have grown to accept the term, but rather as a permission or an act done with governmental sanction, authority and approval. In this sense the contract, then before the court, was the same in character as the contract in the instant suit ; in law, the exchange of prisoners of war is no more an incident of warfare than the maintenance of the land of the enemy by the victorious military forces occupying it. The achievement of an honorable and lasting peace is the ultimate aim of any civilized nation at war ; it was to accomplish this end that the contract in suit was approved and validated by the Supreme Commander.

" The basic reason, at common law, for denying access to our courts as plaintiffs to non-resident, alien enemies was that not to do so might give aid and comfort to the enemy. The contract in suit did not give such aid or comfort ; it was approved pursuant to the policy of the United States Government which encouraged its making. It cannot be said that this contract is void as against public policy. This suit could have been maintained at common law ; we now consider whether it is prohibited by statute. We conclude that it is not.

" The Trading with the Enemy Act, *supra*, ' was passed with its declared purpose " to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit, under careful safeguards and restrictions, certain kinds of business to be carried on " '. *Ex parte Kawato, supra*, 317 U.S. 76, 63 S.Ct. 119, 87 L. Ed. 58. . . . the contract in suit not being prohibited under common law required no license under the Act. *Cf. Ex parte Kawato, supra.* The approval and authorization of the contract was an act by the Commander of the allied forces in the occupied land of a people with whom a treaty of peace was under negotiation. There was implicit in the action of the United States in joining in the designation of the Supreme Commander a grant of power to him to do all acts necessary to military occupation. The contract was approved in the accomplishment of this purpose. It was a military act done by an agent of the President as Commander-in-Chief in time of war. It must be respected and enforced by out courts."

[Report : 101 F. Supp. 243.]

Note.—In *Pang-Tsu Mow et Al.* v. *Republic of China*, 201 F. 2d 195, 198–199, (1952), the Court *held* : " The Republic of China is a sovereignty and has standing to sue unaffected by its character as the government of a foreign nation. . . . It is under no disability by statute or otherwise which might in time of war, for example, bar our courts to the governments of unfriendly nations." (See *Republic of China* v. *Pang-Tsu Mow et Al.*, 101 F. Supp. 646 (Case No. 26 in this volume).)

ii.—On Treaties

War—Effect of—On Treaties—Revival of Treaties after the War—Non-Resident Aliens—Right to Inherit Property Situate in the United States. **Case No. 154**

In re MEYER'S ESTATE.

United States, District Court of Appeal, Second District, California. December 3, 1951.

THE FACTS.—The decedent, a national and resident of Germany, died intestate in Bremen in 1924, survived by American and German heirs. Decedent's estate in California, frozen in 1941 pursuant to the Trading with the Enemy Act, was not administered in California until 1948. In 1950, the Attorney-General of the United States vested in himself all rights in the California estate of two of the decedent's heirs, who were aliens resident in Bremen. The American administratrix of the decedent's estate filed with the Court instruments executed in Germany alleging that the decedent's German heirs had waived all rights in the decedent's estate in favour of the American heirs. The Attorney-General responded that the waivers, made at the time when the Trading with the Enemy Act was in force, were in contravention of that Act and were null and void. It was further argued that the non-resident heirs were barred from succeeding, *ab initio*, by reason of municipal law, unless their rights were affected by treaty. The present report is concerned only with the question whether, as the result of the state of war between Germany and the United States in the First World War, the inheritance rights of German nationals as provided by pre-existing treaties had been abrogated and, if abrogated, whether these treaties were covered by the provisions of the Treaty of Versailles relating to the renewal of pre-war treaties. The relevant provisions of the treaties in question are set forth in the *Held* below.

Held: that, by a treaty which was held not to have been abrogated by the First World War, the non-resident aliens in fact succeeded to their shares. However, waiver, on their part, of succession was void, by the Common Law as well as by the terms of the Trading with the Enemy Act. Such shares accordingly were held to have vested properly in the Attorney-General. The Court said:

". . . (S)ince these heirs were non-resident aliens at the time of decedent's death, they were required, under sections

Case No. 154 *Contd.* 672 [1] and 1404 [2] of the Civil Code, then in force, to appear and claim their succession within five years after decedent's death, or be barred from taking.

"Appellants' position is that the non-resident heirs were barred from succeeding to the estate by virtue of former Civil Code sections 672 and 1404, that the entry of Rolf Jansen into the United States in 1929 'prevented the State of California from proceeding to declare an escheat of the estate', and that since no escheat proceedings were commenced by the State, appellants became entitled to the whole thereof.

"Respondent contends that the Civil Code sections were suspended and controlled by the treaty of 1828 with Prussia.[3] Appellants say that the treaty was abrogated by World War I, was no longer in effect in 1924, and that the treaty with Germany of December 8, 1923,[4] was inapplicable, as it was not proclaimed until October 14, 1925, after decedent's death.

"The treaty of 1828 with Prussia was not controlling. Bertha Meyer died a citizen of Bremen in 1924. Bremen was not a part of Prussia in 1828 or in 1924.[5] The controlling treaty was the treaty between the United States and the Free Hanseatic Republics of Lübeck, Bremen, and Hamburg, signed December 20, 1827.[6] Article VII of the Bremen treaty [7] clearly

---

"[1] 'If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in title eight, part three, Code of Civil Procedure.'

"[2] 'Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession.'

"[3] 8 Stat. 378–386.

[4] 44 Stat. 2132.

"[5] In 1646 Emperor Frederick III created Bremen a free imperial city. See 'Bremen', 4 Ency.Brit., 89; 'Hanseatic League', 11 Ency.Brit., 162. Bremen was a free German state. 10 Ency.Brit., 280. In 1866 it became a part of the North German Union, id. 290, and in 1871 a part of the German Empire. Id. 293.

"[6] 8 Stat. 366; 18 Stat. part 2, p. 400. The cause is argued by both sides on the assumption that the treaty of 1828 with Prussia was controlling. However, as the pertinent provisions of the treaty of 1827 with Bremen are substantially identical with the provisions of the treaty of 1828 with Prussia, the argument is relevant. 8 Stat. 384, art. XIV.

"The government of the United States has recognized the treaty of 1827 with Bremen as applicable to Germany after the formation of the North German Union in 1866 and the German Empire in 1871, and accorded reciprocity accordingly. *North German Lloyd S. S. Co.* v. *Hedden*, D.C., 43 F. 17, 19; *Terlinden* v. *Ames*, 184 U.S. 270, 22 S.Ct. 484, 46 L. Ed. 534, 542–545. See, also, *Flensburger Dampfercompagnie* v. *United States*, 59 F. 2d 464, 467, 73 Ct.Cl. 646, and authorities there cited.

"[7] 'The citizens of each of the contracting parties shall have power to dispose of their personal goods, within the jurisdiction of the other, by sale, donation, testament, or otherwise; and their representatives being citizens of the other party, shall succeed to their said personal goods, whether by testament or *ab intestato*, and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein said goods are, shall governs the right of succession to real and personal property, and protects the right of citizens of each of the contracting parties reciprocally to own, dispose of, and transmit personal property situated in the other country, free from provisions or restrictions which discriminate because of alienage. No limitation is placed on the right of citizens of Bremen.

“ The provisions of the treaty of 1827 with Bremen, if in force in 1924, were the supreme law of the land and superseded all local laws inconsistent with its terms. To the extent that our statutes conflicted with the treaty, the former were superseded by the latter, which must control.[1]

“ Under our laws in force in 1924, the date of death of decedent, the property of a person who died intestate vested in his heirs immediately upon the death of the ancestor. If the heirs were citizens of the United States, they became vested immediately with the entire estate of the ancestor by a title which was indefeasible except for the purposes of administration in the manner and for the purposes provided by law ; but if such heirs were non-resident aliens, the estate which vested in them upon the death of the ancestor was not an absolute or indefeasible estate, but was a conditional estate, upon the condition subsequent that if they failed to appear and claim the same within five years, their right ceased. The non-resident alien, under our law unaffected by a treaty, did not enjoy the same right to succeed to personal property as citizens of the United States.[2] The non-resident alien heirs of Bertha Meyer did not appear and claim their succession within five years after her death. Therefore, unless their right to succeed was affected by a treaty, they were barred from taking under our law as it existed in 1924.

“ The effect of war upon existing treaties of belligerents has been the subject of much discussion. The old doctrine, sometimes asserted by the older writers, that war *ipso facto* annuls treaties of every kind between the warring nations, is repudiated by the great weight of modern authority ; and the view now commonly accepted is that whether the stipulations of a treaty are annulled by war depends upon their intrinsic character.[3]

be subject to pay, in like cases ; and if, in the case of real estate, the said heirs would be prevented from entering into the possession of the inheritance on account of their character of aliens, there shall be granted to them the term of three years to dispose of the same, as they may think proper, and to withdraw the proceeds without molestation, and exempt from all duties of detraction on the part of the government of the respective States.’ 8 Stat. 370.

“ [1] *In re Estate of Turner*, 51 Cal.App. 317, 322–323, 196 P. 807 ; *Blythe* v. *Hinckley*, 127 Cal. 431, 436, 59 P. 787 ; *In re Estate of Romaris*, 191 Cal. 740, 218 P. 421 ; *In re Estate of Knutzen*, 31 Cal. 2d 573, 577, 191 P. 2d 747 ; *Clark* v. *Allen*, 331 U.S. 503, 67 S.Ct. 1431, 91 L. Ed. 1633, 1641, 170 A.L.R. 953 ; 52 Am. Jur. 816, § 18.

“ [2] *In re Estate of Romaris*, 191 Cal. 740, 744, 218 P. 2d 421.

“ [3] *Clark* v. *Allen*, 331 U.S. 503, 67 S.Ct. 1431, 91 L. Ed. 1633, 1641, 170 A.L.R. 953 ; *Society for Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464, 21 U.S. 464, 5 L. Ed. 662, 669 ; *Karnuth* v. *United States*, 279 U.S. 231,

Case No. 154 *Contd.* The authorities appear to be in accord that there is nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of war in the enforcement of dispositive treaties or dispositive parts of treaties. Such provisions are compatible with, and are not abrogated by, a state of war.[1]

49 S.Ct. 274, 73 L. Ed. 677; *Techt* v. *Hughes*, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166, certiorari denied 254 U.S. 643, 41 S.Ct. 14, 65 L. Ed. 454; *State* [*ex rel. Miner*] v. *Reardon*, 120 Kan. 614, 245 P. 158, 47 A.L.R. 452; *Goos* v. *Brocks*, 117 Neb. 750, 223 N.W. 13; *The Sophie Rickmers*, D.C.S.D.N.Y., 45 F. 2d 413, 418–421; *Sutton* v. *Sutton*, 39 Eng. Rep. 255; 5 Moore's Digest of International Law, 383, § 779.

" [1] *Clark* v. *Allen*, 331 U.S. 503, 67 S.Ct. 1431, 91 L. Ed. 1633, 1641, 170 A.L.R. 953; *Techt* v. *Hughes*, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166, certiorari denied 254 U.S. 643, 41 S.Ct. 14, 65 L. Ed. 454; *State* [*ex rel. Miner*] v. *Reardon*, 120 Kan. 614, 245 P. 158, 47 A.L.R. 452; *Goos* v. *Brocks*, 117 Neb. 750, 223 N.W. 13; *The Sophie Rickmers*, D.C.S.D.N.Y., 45 F. 2d 413, 418–421; 52 Am. Jur. 813, § 15; Anno.: 11 A.L.R. 180; V Hackworth, Digest of International Law, 377–390 (a publication of the Department of State).

" In upholding the right of an Austro-Hungarian national, resident in the United States, to inherit land in New York after the outbreak of war between the United States and Austria-Hungary under the treaty of commerce and navigation with Austria of 1829, as extended by the convention of 1848, the Court of Appeals of New York in *Techt* v. *Hughes*, *supra*, speaking through Judge Cardozo, said, at page 191 of 128 N.E.: ' The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law. The older writers sometimes said that treaties ended ipso facto when war came. 3 Phillimore, Int. L. 794. The writers of our own time reject these sweeping statements. 2 Oppenheim, Int. L. § 99; Hall, Int. L. 398, 401; Fiore, Int. L. [Borchard's Transl.] § 845. International law to-day does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules. When it attempts to do more, it finds that there is neither unanimity of opinion nor uniformity of practice. The whole question remains as yet unsettled.' Oppenheim, supra. This does not mean, of course, that there are not some classes of treaties about which there is general agreement. Treaties of alliance fall. Treaties of boundary or cession, ' dispositive ' or ' transitory ' conventions, survive. Hall, Int. L. pp. 398, 401; 2 Westlake, Int. L. 34; Oppenheim, supra. So of course do treaties which regulate the conduct of hostilities. Hall, supra; 5 Moore Dig. Int. L. 372; *Society for Propagation of the Gospel* v. *Town of New Haven*, 8 Wheat, 464, 494, 5 L. Ed. 662. Intention in such circumstances is clear. These instances do not represent distinct and final principles. They are illustrations of the same principle. They are applications of a standard. When I ask what that principle or standard is, and endeavour to extract it from the long chapters in the books, I get this, and nothing more: That provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected. . . . I find nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of the war in the enforcement of this treaty, so as to sustain the plaintiff's title.'

" In *State* [*ex rel. Miner*] v. *Reardon*, *supra*, 120 Kan. 614, 245 P. 158, 47 A.L.R. 452, a citizen of the United States died intestate October 15, 1924, owning real property and leaving non-resident alien heirs, citizens of Germany, residing in Prussia. The state brought action against the non-resident alien heirs asking to be adjudged the owner of the land on the ground that the aliens were incapable of inheriting, there being no statute qualifying them. The state contended that the treaty of 1828 with Prussia ceased to be effective by reason of the war between the United States and Germany. The Court said 245 P. at page 159: ' Upon the grounds indicated in the opinion in the *Techt-Hughes Case* we regard the reciprocal privilege of inheritance as not so related to the carrying on of a war as to create a presumption of an intention it should

" We therefore hold that the rights of Emilie Bredehorst and Hans Jansen to inherit from Bertha Meyer, under the treaty with Bremen, were not cut off by the declaration of war between the United States and Germany. There remains the question whether the right of citizens of Bremen to inherit was affected by what occurred after the war of 1917–18.

" The treaty of peace between the United States and Germany, proclaimed November 14, 1921, referring to the Treaty of Versailles, provided : ' (1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in . . . Parts . . . X . . .' 42 Stat. 1939. Other pertinent clauses are set forth in the margin.[1] The Treaty of Versailles stipulated in Article 289 of Part X : ' Each of the Allied or Associated Powers, being guided by the general principles or special provisions of the present Treaty,

---

operate only in time of peace. Practically the only important question is which way the presumption lies, for, of course, either belligerent by affirmative action may use its own pleasure as to suffering the pre-war condition to continue.'

" In a like holding considering the provisions of treaties with the several German states which secured to citizens of the German states the right to inherit real estate in the United States, the Supreme Court of Nebraska in *Goos* v. *Brocks*, *supra*, 117 Neb. 750, 223 N.W. 13, at page 16, said : ' [T]he treaty provision, involved in this action may not be disregarded unless required by the necessities of war. The right of alien enemies to inherit cannot affect the fortunes of war existing between the parties to the treaty unless the inheritance may be sold and the proceeds placed in the possession of the enemy during the progress of hostilities. It is at all times within the power of the government of this country to prohibit the withdrawal of such funds by citizens of a nation with which we are at war. This power has been exercised in the passage of the act providing for the appointment of a custodian of alien enemy property who by national legislation is authorized to seize and hold during the war all property situated in this country and owned by alien enemies. . . . We therefore hold that the right to inherit lands conferred by the treaties involved is a provision that is compatible with, and is not abrogated by, a state of war between this country and the German Empire.'

" Article XXIV of the treaty of 1799 between the United States and Prussia, 8 Stat. 162, dealing with treatment of prisoners of war, which was revived by the treaty of 1828, was regarded as in effect after the outbreak of war between the United States and Germany in 1917. (The Secretary of State (Lansing) to the Secretary of War (Baker), Apr. 17, 1918, MS. Department of State, file 763–72114/3322. See also 1918 For. Rel., Supp. 2, pp. 55, 57, 59, 86, 169.)

" [1] ' Article I. Germany undertakes to accord to the United States, and the United States shall have, and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States. Article II. With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties :

' (1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1 of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV. The United States in availing itself of the rights and advantages stipulated in the provisions of that Treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions. . . .' 42 Stat. 1939, 1942.

Case No. 154 *Contd.*

shall notify to Germany the bilateral treaties or conventions which such Allied or Associated Power wishes to revive with Germany. . . . A period of six months from the coming into force of the present Treaty is allowed to the Allied and Associated Powers within which to make the notification. Only those bilateral treaties and conventions which have been the subject of such a notification shall be revived between the Allied and Associated Powers and Germany ; all the others are and shall remain abrogated.' V Hackworth, Digest of International Law, 386, a publication of the Department of State. The United States did not make the notification with respect to any of the provisions of the treaty with Bremen of 1827.[1] We are of the opinion, in accord with the Supreme Court of Kansas,[2]

"[1] V Hackworth, Digest of International Law, 387–390 (a publication of the Department of State).

"[2] *State* [*ex rel. Miner*] v. *Reardon*, *supra*, 120 Kan. 614, 245 P. 158, at page 160, in which the court, in considering the effect of the first World War on the treaty of 1828 between the United States and Prussia, said : 'Considered by itself the provision that each of the Allied or Associated Powers shall notify to Germany the treaties which it wishes to revive may readily be interpreted as not applying to any treaty or part of a treaty which was not suspended or annulled by the war, since there is no occasion to revive a treaty or part of one which has remained continuously in force. But the fact of the regulations regarding revival being expressly made applicable to treaties with countries with which Germany had not been at war suggests that the treaties which were no longer in force were not the only ones to be revived. Moreover, the statement as to the effect of nonrevivor is not merely that treaties which have not been the subject of notification shall *remain* abrogated. The language is : ' All the others *are* and shall remain abrogated '. However, the treaty with Germany did not make the terms of article 289 of the Treaty of Versailles binding on the United States. It merely extended to the United States the rights and advantages stipulated in that article for its benefit. By that means this country was given the privilege of reviving any treaties (or parts of treaties) with Germany (or any of the German states) which had been annulled or suspended by the war, but it does not follow that a part of a treaty which remained unimpaired required revival in order to remain in force, even if that was the effect of the Treaty of Versailles as between the parties to it in a like situation. It seems obvious that there was no intention of absolutely wiping out all former treaties between the United States and Germany. There was necessarily an implied exception in favor of those entered into to establish a permanent status, such as one settling a boundary dispute. Nor can it have been intended to divest property rights that had already vested under existing treaties. The question to be determined is whether the same considerations which are held to warrant classifying treaty provisions granting a reciprocal privilege of inheritance with those which are not affected by war may not also warrant classifying them with those that were not intended to be nullified by the failure to have them formally revived after the war. To hold in the affirmative requires some extension of the principle, but all the arguments in favor of its application in the one case tend, although with perhaps less force, to justify its application in the other. With respect to old treaties concerning, for instance, commerce, which became inoperative by reason of the war because inconsistent with it, this government may well have thought it better there should be no revival, leaving the matters affected to be adjusted by subsequent negotiations. But it is difficult to believe there was a purpose to withdraw the privilege of individuals to inherit, which is not incompatible with hostilities, and which the war itself had not disturbed. We hold that the provision of the treaty with Prussia, so far as it related to this subject, remained in force until it was replaced by a like provision of the treaty with Germany, signed December 8, 1923, and proclaimed October 14, 1925. The defendants suggest that the League of Nations clause of article 289 of the Treaty of Versailles, making that Article 289 is to be interpreted as not applying to any treaty or part of a treaty which was not abrogated by the war, since there was no occasion to revive a treaty or part of one which had been continuously in force, and that it was not the intention by the clause ' all the others are and shall remain abrogated ' to absolutely wipe out all former treaties between the United States and the German states. The language of Article 289 is equivocal and uncertain. It is not lightly to be supposed that it was the intention to revive by notice a provision of a treaty which had not been abrogated, or to abrogate a provision which was not incompatible with war and which was for the mutual benefit of the citizens of the parties to the treaty. In the absence of express words to that effect, it is difficult to infer that it was the purpose of the contracting parties to withdraw the privilege of individuals to inherit, which was not incompatible with hostilities, and which the war had not disturbed. We think that Article 289 means that a treaty which had been abrogated by the war could be revived only in the manner therein provided, and that all treaties which had been abrogated by the war and were not so revived ' are and shall remain abrogated '.

" We hold that the provision of the treaty of 1827 with Bremen, so far as it related to the right of citizens of Bremen to inherit, was in force on August 2, 1924, the date of death of Bertha Meyer.

" The argument that ' if no reciprocal rights of inheritance were in effect on August 2, 1924, then the estate vested in Rolf Jansen in June, 1929, on his entry into the United States and in Irma Martin on her entry [April, 1939]' is without merit. If a non-resident alien does not appear and claim his succession within five years after the death of his ancestor, the property does not go back to the estate nor is it inherited by the other heirs: it vests in the state.[1] . . ."

[Reports: 107 Cal. App. Rep. 799; 238 P. 2d 597.]

Note.—This case is noted in *American Journal of International Law*, 46 (1952), p. 573. For a discussion of the effect of military

---

the League the arbitrator of any difference of opinion in connection with the revival of treaties, prevents the application of any part of that article, because of the provision of the treaty of August 25, 1921 (article 2, subd. 2 [42 Stat. 1943]), that the United States shall not be bound by any part of the Versailles Treaty, relating to the League of Nations nor by any action of the League, unless expressly assented to. Possibly the ratification of the treaty containing the provision last referred to may imply an acceptance by this country of the services of the League to the extent indicated in article 289 of the Versailles Treaty. If not, we see no difficulty in rejecting the clause of that article relating to the League of Nations while giving effect to the rest of it.'

" In *Hempel* v. *Weedin*, D.C., 23 F. 2d 949, the court held that certain stipulations in the treaty of 1828 with Prussia which provided that citizens of the respective states shall have the same security and protection as natives of the country wherein they reside, survived the war between the United States and Germany and were effective in 1927."

[1] [Footnote omitted.]

Case No. 154 *Contd.* occupation upon the reciprocal right of inheritance of German and United States nationals see *In re Reihs' Estate*, 75 Cal. 570, 227 P. 2d 564 (1951), where the holding was similar to that in the instant case. See also *In re Miller's Estate*, 36 App. Cal. 367, 230 P. 2d 667 (1951). In *In re Muller's Estate*, 104 N.Y.S. 2d 133, 199 Misc. 745 (1951), where the facts were similar to those of the case reported above, the Court reached a like result. It held that the attempted renunciations were in violation of a United States Military Government Law, and that that Government was " supreme authority over the people in the territory occupied ".

Case No. 155 **War — Effects of Outbreak of — On Treaties — Multilateral Treaties—International Labour Conventions.**

ÉTABLISSEMENTS CORNET *v.* VVE GAIDO.

France, Court of Appeal of Aix. May 7, 1951.

THE FACTS.—On March 10, 1943, one Luigi-Emilio Gaido, an Italian national, died as a result of injuries received while working for the appellant firm. His mother, also an Italian national, and resident in Italy, sought to obtain compensation for his death in conformity with French workmen's compensation legislation. By judgment of February 15, 1950, the Tribunal Civil of Marseilles admitted her claim and ordered her to prove that she had been dependent on her son. This was an appeal against that decision. It was contended on behalf of the appellant firm that an alien was entitled to workmen's compensation only on the basis of treaty, that at the time of the accident all Franco-Italian treaties had lapsed as a result of the outbreak of war, and that, accordingly, the widow Gaido was not entitled to compensation.

Held: that the appeal must be dismissed. The widow Gaido was entitled to workmen's compensation in France by virtue of an International Labour Convention to which both France and Italy were parties. Accession of States to a régime established by an international organization did not lapse as a result of war. The Court said :

" The appellant claims that the widow Gaido was not entitled to the benefit of French workmen's compensation legislation since at the time of the disputed accident all international agreements between France and Italy had lapsed as a result of the outbreak of war, and that, in admitting her claim, the lower Court violated a principle laid down, after many divergent decisions, by a full divisional Court of the Court of Cassation on June 22, 1949.

" The principle established by that Court applies to ' reciprocal obligations assumed by the High Contracting Parties by a treaty on private law questions concluded with reference to a state of peace '. It does not apply in the present case. It was not by virtue of a reciprocity treaty concluded with Italy that France undertook to grant Italian nationals suffering employment injury on French territory the same treatment as to French nationals suffering such injury. It was an international convention drawn up by the International Labour Organization in Geneva on June 10, 1925, which provided that each nation adhering to that Convention undertook to grant foreign workers who suffered personal injury due to industrial accidents happening in its territory, or to their dependants, the same treatment in respect of workmen's compensation as to its own nationals, without any condition as to residence (Article 1). That Convention was ratified in France by a Law of March 30, 1928, and the accession of France was registered by the Secretary-General of the League of Nations on April 4, 1928. A large number of other States, including Italy on March 15, 1928, likewise acceded to the Convention. Thus there has not been a bilateral or a multilateral agreement on the subject, but affiliation, by the will of each acceding State independently notified to that Organization, to a régime established by an international organization in the interest of the workers of all countries.

"The state of war between France and Italy did not *ipso facto*, without express denunciation, annul special obligations assumed by those States before an international organization. At the most the exercise of the rights deriving from these obligations was suspended."

[Report: *Revue critique de Droit international privé*, 41 (1952), p. 697.]

War — Effects of Outbreak of — On Treaties — Nationality Acquired under Treaty Prior to War—Loss of Nationality Acquired under Treaty—Whether Affected by Abrogation of Treaty on Outbreak of War. **Case No. 156**

In re BARRABINI.

France, Court of Appeal of Paris. July 28, 1950.

THE FACTS.—This was an appeal against a decision of the Tribunal Civil de la Seine of January 28, 1949, to the effect that the appellant, Barrabini, had never, by birth or otherwise, acquired French nationality. Barrabini was born in 1925 in Tunis, the son of an Italian father and a mother of French origin who had acquired Italian nationality by marriage. He claimed French nationality in reliance on Article 1 of a Law of December 20, 1923, which provided that "any person born in the Regency of Tunis of parents one of whom was himself born in the Regency shall be a French national". Barrabini satisfied the conditions set forth in that Article. At the same time, that provision was, at the time of his birth, made

Case No. 156 *Contd.* inapplicable to Italians born in Tunis, by virtue of a Franco-Italian Convention of September 28, 1896, Article 13 of which provided that persons who, according to Italian law, had retained Italian nationality, would be regarded as Italian nationals in Tunisia. However, it was now contended on behalf of the appellant that that Treaty lapsed on the outbreak of war between France and Italy in 1940 ; that the Law of December 20, 1923, then became applicable to Italian nationals as a " new law " ; and that, according to the Nationality Code, new laws concerning the conferment of French nationality as the nationality of origin applied even to persons born before the date of their entry into force, provided that such persons had not attained their majority on that date.

Held: that the appeal must be dismissed. To deprive the appellant of a nationality which he had validly acquired by birth in virtue of a treaty would be a violation of that treaty. The Court said :

" According to the Ordinance of the French Government dated June 22, 1944, the provisions of the Franco-Italian Convention of 1896 became inapplicable ' as from June 10, 1940 '. That provision of the Ordinance was confirmed by the French and Italian Governments, *i.e.* by the two signatories of the Convention, by an Exchange of Letters dated January 26, 1945. The Law of December 20, 1923, thus became applicable to Italians on June 10, 1940. That Law makes the acquisition of French nationality dependent on birth. The nationality of origin is acquired at that moment and during minority, with permanent effect, since it requires the formal expression of the will of the person concerned to renounce that nationality.

" In these circumstances, to apply to Barrabini the provisions of the French Law of December 20, 1923, and to deprive him, either as from the date of his birth or as from June 10, 1940, of a nationality which he validly acquired by birth in virtue of the Convention of 1896, would constitute a repudiation of that Convention by the unilateral act of one of the signatories. . . . Whatever the cause of the lapse of the Convention, such a unilateral violation of a contract would be contrary to all general principles of law."

[Report : *Revue critique de Droit international privé,* 41 (1952), p. 453.]

War—Effects of—On Treaties—Non-Political Treaty—Hague Convention on Civil Procedure, 1905—One Party to Treaty Involved in War—Another Party Neutral—Whether Treaty Binding on Occupant of Former Country after Conclusion of Hostilities.

See Case No. 178 (*Enforcement of Foreign Judgments* (*Switzerland*) *Case*).

iii.—On Private Contracts

War—Effect on Contracts—Power of Attorney.

See Case No. 162 (*Hangkom Kwington Woo* v. *Liu Lan Fong*).

iv.—On Enemy Subjects with regard to

(a) THEIR PERSONAL STATUS IN THE TERRITORY OF THE BELLIGERENT. *PERSONA STANDI IN JUDICIO*

War—Effects of—On Enemy Persons—Alien Enemy—Licence to Sue—Whether Court may Inquire into Validity of Licence—Whether Licence Applies to Alien Enemies Actively Engaged in Belligerent Operations—Effect of Occupation on Private Property. **Case No. 157**

BUGSIER REEDEREI-UND-BERGUNGS AKTIENGESELLSCHAFT *v.* OWNERS OF S.S. *BRIGHTON*.

England, High Court of Justice, Admiralty Division.
(Willmer J.)
June 13, 1951.

THE FACTS.—This was a preliminary objection to jurisdiction in an action in which the plaintiffs, a salvage firm, claimed for salvage services rendered to the steamship *Brighton* in 1949. The plaintiffs were alien enemies but the Secretary of State, under a Royal Warrant, had issued a licence to the plaintiffs to enable them to sue in the English courts. The defendants said it was not a valid licence. It was further argued for them that, since the Allied occupation of Germany, the tugs which had performed the salvage were owned not by the defendants but by His Majesty.

Held: that the objection taken by the defendants was ill-founded and without merits. Willmer J. said:

" The plaintiffs, a company domiciled in Germany, are undoubtedly alien enemies, and they sue here, as appears by paragraph 1 of the statement of claim, pursuant to a royal licence, which has been placed before me. It is signed by his Majesty's Secretary of State for Home Affairs, and was issued on June 27, 1949, in pursuance of the powers conferred by his Majesty on the Principal Secretaries of State by virtue of a warrant dated April 1, 1944. Not only was the Royal Licence issued pursuant to that warrant, but on its face it purports to be issued in pursuance of its terms.

Case No. 157 *Contd.*

" It may be remarked in passing that, since the date when the services were rendered in this case, a general licence has been issued in favour of alien enemies by virtue of an Order in Council, made during 1949, after the date of these services ; so that were the question to arise in relation to services rendered since that date it would not be possible to take this objection to my jurisdiction. However, in this case objection is taken to my jurisdiction on the basis that the royal licence on which the plaintiffs rely is not a valid licence enabling them to sue in this Court.

" In the first place, it appears to me that the issue of such a licence is an executive act, or a political act, entirely within the discretion of his Majesty's Secretary of State, and that it is not competent for this Court to inquire into the validity of a licence signed by one of his Majesty's Secretaries of State in pursuance of the warrant, or to inquire into the circumstances in which it was issued. That is in accordance with the view expressed by Sir Arnold McNair in *Legal Effects of War* (3rd ed., p. 189). But it seems to me that an even better authority for that view was produced at the very last moment of the argument, when I was referred to some remarks made by no less an authority than Lord Ellenborough in *Usparicha* v. *Noble* ((1811) 13 East 332). That case concerned a licence to trade, but I see no distinction in principle between that and a licence to sue. In the course of his judgment Lord Ellenborough said (at p. 341) : ' Whatever commerce of this sort '—(that is to say, trading with an alien enemy)—' the Crown has thought fit to permit (which in respect of its prerogatives of peace and war, the Crown is by its sole authority competent to prohibit or permit) must be regarded by all the subjects of the realm, and by the Courts of law, when any question relative to it comes before them, as legal, with all the consequences of its being legal '. I do not think, therefore, that the licence signed by his Majesty's Secretary of State having been put before me, that to use the words of Lord Ellenborough, it is competent for me to do other than accept it as legal.

" However, in case I am wrong about that, I will state briefly my reasons for thinking that, even if it were competent for me to examine the validity of the licence, I should still be forced to come to the conclusion that it was in fact a validly issued licence. It purports on its face to have been issued by virtue of the warrant of April 1, 1944, which is in these terms : ' Whereas We deem it advisable to authorize Our Principal Secretaries of State to issue licences in Our Name and on Our behalf to persons who are in contemplation of law alien enemies to prosecute proceedings in Our Courts in Great Britain ; Now therefore We do authorize each of Our Principal Secretaries of State for the time being to issue and sign such licences as aforesaid during Our will and pleasure '. That Royal Warrant authorizes the principal Secretaries of State to issue licences to sue in favour of persons who are in contemplation of law alien enemies. But it is objected on behalf of the defendants, having regard to the date on which the warrant was issued, that it cannot be taken as contemplating proceedings by persons who are not only in contemplation of law alien enemies, but were at the time actively engaged in belligerent operations against the realm. It is urged that the warrant was designed for the protection of those unfortunate people who, by the fortunes of war, found themselves technically alien enemies—persons such as French, Dutch or Belgian nationals—and that it ought not to be construed as also including persons of German nationality, who at the date of the warrant were actively engaged in the prosecution of war against his Majesty.

" I confess that I can see no ground whatsoever for any such distinction ; at least, if such a distinction is to be made, it appears to me that it is a matter for his Majesty's Secretary of State to take into consideration when he is called on to exercise his discretion one way or the other whether a licence should be issued in a particular case. In my opinion the warrant, by its terms, is wide enough to include alien enemies of all countries.

" Persons of German nationality were at all times aliens. On September 5, 1939, on the passing of the Trading with the Enemy Act, in addition to being aliens, they became enemies. That follows from the definition of ' enemy ' in section 2 of the Act. Ever since September 5, 1939, therefore, German nationals, such as the owners of the tugs concerned in this case, have been in contemplation of law alien enemies. The warrant being such as to authorize the Principal Secretaries of State to issue licences on behalf of persons who are in contemplation of law alien enemies, it seems to me obvious that by its terms it is wide enough to authorize a Secretary of State to issue a licence in favour of German nationals such as the plaintiffs in this case. It is a matter entirely for the discretion of the Secretary of State, in his executive capacity, to decide whether in a particular case the licence is one which ought to be issued or one which ought to be withheld. As a matter of law, even if it were proper for me to question the validity of such a licence, it would be quite improper for me to inquire whether this particular licence was properly or rightly issued by his Majesty's Secretary of State. The objection to the jurisdiction, therefore, seems to me to be of no force.

" A further point was taken by counsel for the defendants with which I can deal very briefly. It was suggested that ever since the occupation of Germany by the Allied forces, and, more particularly, ever since the occupation of this part of Germany by British forces, the plaintiffs ceased to be the owners of what had previously been their tugs, and of the other equipment referred to in the statement of claim, and it was

Case No. 157 *Contd.* suggested that the property in all these chattels passed by right of conquest to his Majesty's Government. No authority was cited in support of that somewhat arresting proposition, and I know of no such authority.

" As I understand the position, ever since 1945 this particular part of Germany has been subject to occupation by his Majesty's Forces, that is to say, it is enemy-occupied territory. There is no question of any annexation on the part of his Majesty, nor can there be, in my judgment, any question of his Majesty's having acquired rights of property previously vested in the citizens of that part of Germany. All that can be said in that regard is that wide powers of requisition, and so forth, are vested in the occupying Power. I have been given no authority in support of the proposition that privately owned chattels pass by reason of the occupation into the ownership of his Majesty. That point, also, appears to me to be wholly without merit.

" A third point taken by counsel on behalf of the defendants was whether certain tugs included in this claim are embraced by the terms of the royal licence. It appears to me that is a point which I cannot determine until I have heard all the facts of the case, the circumstances in which the several tugs came to be employed, and the terms on which they were employed.

" For the moment I rule, therefore, that the case must proceed."

[Report : [1951] 2 T.L.R. 409.]

Case No. 158 **War—Effects of—On Enemy Aliens—The Right to Sue—The Law of Norway.**

See *Kühn* v. *Custodian of Enemy Property*, in which the Supreme Court of Norway held on September 8, 1951, that there is no rule in any Norwegian law which forbids enemy nationals from suing in the Norwegian courts. The Court added that, in particular, after the end of hostilities there could be no good reason for such prohibition.

[Report : *Rt.*, 1951, p. 757.]

(b) THEIR PROPERTY AND OTHER RIGHTS

War—Effects of Outbreak of—On Enemy Subjects With Regard to Their Property—Seizure of Bearer Bonds Outside of United States by Vesting Order Directed to Obligor and Indenture Trustee of Bonds Within the United States. **Case No. 159**

CITIES SERVICE COMPANY *v.* MCGRATH.

United States, District Court, Southern District, New York. *October* 24, 1950.

Court of Appeals, Second Circuit. June 13, 1951.

Supreme Court. January 28, 1952.

THE FACTS (reproduced from the opinion of the Supreme Court).—" In this suit the Attorney General of the United States as successor to the Alien Property Custodian seeks payment by petitioners of two 5% gold debentures of the face value of $1,000 each and payable to bearer. Petitioner Cities Service Company is obligor on the debentures and petitioner Chase National Bank of New York is the indenture trustee. The obligations represented by these debentures had previously been vested, under provisions of the Trading with the Enemy Act (40 Stat. 411, as amended, 50 U.S.C. App. § 1 *et seq.*), upon a finding that the obligations were owned by a resident and national of Germany. Neither of the debentures is or ever has been in the possession of respondent. One of the debentures, although not maturing until 1969, was presented for redemption at Chase's office in New York City on January 5, 1950, subsequent to the date of the vesting order. A legend was then typed on the debenture reciting the issuance of the vesting order and the claims of respondent thereunder. This debenture is at present in the possession of a brokerage house in New York City. The other debenture matured in 1950 but has never been presented for payment. Its whereabouts are unknown but it was last reported to be in Berlin in the hands of the Russians."

Held (by the District Court): that summary judgment must be given for the defendants. The debentures were not within the jurisdiction of the United States when the order purporting to vest them in the Alien Property Custodian was issued.

On appeal,

Held (by the Court of Appeals): that the decision of the Court below must be reversed. The Trading with the Enemy Act specifically authorized vesting of securities though outside of the country, and in the event of the obligor being compelled to pay the holder of the certificate in the courts of another

Case No. 159 *Contd.* country, the obligor would be entitled to reimbursement from the United States Government.

On *certiorari*,

Held (by the Supreme Court): that plaintiff was entitled to summary judgment. The Court stated :

" We believe that the Trading with the Enemy Act grants the authority necessary to vest obligations evidenced by domestic negotiable bearer debentures even though the debentures themselves are outside the United States. By § 7(*c*) of the Act, enacted during World War I, the President is given the authority to seize all enemy property ' including . . . choses in action, and rights and claims of every character and description owing or belonging to . . . an enemy . . .'. At the beginning of World War II, Congress gave an even broader grant of authority to the Executive through an amendment to § 5(*b*), providing that ' any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President . . . '. See *Markham* v. *Cabell*, 1945, 326 U.S. 404, 411, 66 S.Ct. 193, 196, 90 L. Ed. 165 ; *Silesian-American Corp.* v. *Clark*, 1947, 332 U.S. 469, 479, 68 S.Ct. 179, 183, 92 L. Ed. 81 [*Annual Digest*, 1947, Case No. 88] ; *Clark* v. *Uebersee Finanz Korp.*, 1947, 332 U.S. 480, 485–486, 68 S.Ct. 174, 176, 92 L. Ed. 880 [*Annual Digest*, 1947, Case No. 91]. That the obligations represented by negotiable bearer debentures come within these broad terms is beyond question.

" Petitioners urge, however, that the debentures themselves constitute the debt, and since the debentures were located outside of the United States at the time of vesting, the debts did not have a situs within the United States and therefore were not proper subjects of seizure. To apply this fiction here would not only provide a sanctuary for enemy investments and defeat the recovery of American securities looted by conquering forces ; it would also restrict the exercise of the war powers of the United States. Congress did not so intend. The Custodian's authority to reach a debenture or bonded indebtedness without seizure of the instrument itself is explicitly recognized by § 9(*n*) of the Act, which provides that ' [i]n the case of property consisting . . . of bonded or other indebtedness . . ., evidenced . . . by bonds or by other certificates of interest . . . or indebtedness . . ,. where the right, title, and interest in the property (but not the actual . . . bond or other certificate of interest or indebtedness) was conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him . . .', then the President may, in proper cases, order return of 80% of the property. Moreover, in giving the Custodian this power to seize an interest represented by a bond or debenture without seizure of the actual instrument, Congress transgressed no constitutional limitations on its jurisdiction. As the Court of Appeals pointed out, the obligor, Cities Service Company, is within the United States and the obligation of which the debenture is evidence can be effectively dealt with through the exercise of jurisdiction over that petitioner. See *Standard Oil Co.* v. *New Jersey*, (1951) 341 U.S. 428, 438–439, 71 S.Ct. 822, 828, 95 L. Ed. 1078. '. . . [W]e agree that petitioners might suffer judgment the payment of which would effect a double recovery against them. In that event, petitioners will have the right to recoup from the United States, for a taking of their property in violation of the Fifth Amendment, "just compensation" to the extent of their double liability. Such cause of action will accrue when, as, and if a foreign court forces petitioners to pay a holder in due course of the debentures.'"

[Reports: 93 F. Supp. 408; 189 F. 2d 744; 342 U.S. 330, 72 Sup. Ct. 334, 96 L. Ed. 359.]

NOTE.—The decision in the District Court is noted in *Michigan Law Review*, 49 (1951), p. 1064; the decision in the Supreme Court in *American Bar Association Journal*, 38 (1952), p. 502; *Annual Survey of American Law*, 1952, p. 57; *Record of the Association of the Bar of the City of New York*, 7 (1952), p. 153; *Virginia Law Review*, 38 (1952), p. 524.

War—Effects of—On Enemy Property—Appropriation of—Nature of Ownership of Appropriating State—Inter-Allied Reparations Agreement of Paris, 1946—Effect of. **Case No. 160**

KWEEKBEDRIJF *v.* RECEIVER OF TAXES, ROERMOND.

Holland, District Court of Roermond. December 6, 1951.

THE FACTS.—On December 21, 1948, the administrator of the estate of Z., deceased, situated in North Limburg, sold the estate to the plaintiff. The estate had been appropriated by the State of the Netherlands under the Decree on Enemy Property of October 20, 1944 (No. E 133), made by the Netherlands Government-in-Exile.[1] The Receiver of Taxes demanded payment of registration duties on the sale to the plaintiff. The latter objected on the ground that under Section 101 (*c*) of the Registration Act, 1917, no duties were payable on the transfer of State property. The Receiver decided that this exemption did not apply because the ownership by the State of enemy property was fiduciary and conservative rather than confiscatory in nature [so that it was not truly State property]. The plaintiff appealed from this ruling. The Receiver of Taxes

---

[1] The Decree did not simply put enemy property under sequestration for further disposal after the war; it declared the property to be vested in the State.

Case No. 160 *Contd.* contended, *inter alia*, that his view that the State ownership of the property taken over was fiduciary in character was supported by (i) the fact that under the Decree on Enemy Property the assets of an enemy estate vested in the State to the exclusion of the debts, and that the assets were held separately from other State property ; and (ii) the obligation undertaken by the Netherlands under the Inter-Allied Reparations Agreement of Paris of January 14, 1946, to render an account of enemy assets which it had acquired.

Held: that the appeal must succeed and that no registration duties were payable. Neither the Decree of October 10, 1944, nor the obligations of the parties to the Inter-Allied Reparations Agreement had the effect contended for them by the Receiver.

[Report : *N.J.*, 1952, No. 392.]

NOTE.—See, in the same sense, *Van R.* v. *Receiver of Taxes, Amsterdam,* decided by the District Court of Amsterdam on May 23, 1951 (*N.J.*, 1951, No. 494).

vi.—On Neutral Persons and Property. The Right of Angary

Case No. 161 **War—Effects of—On Neutral Property—Neutral Shareholders in Enemy-Controlled Corporation—The Law of the United States of America.**

KAUFMAN *v.* SOCIÉTÉ INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A. [" INTERHANDEL "].

United States, District Court, District of Columbia.
May 24, 1950.

Court of Appeals, District of Columbia Circuit. April 5, 1951.

Supreme Court. April 7, 1952.

THE FACTS (from the decision of the Supreme Court).—" Acting under Section 5 (*b*) of the Trading with the Enemy Act (40 Stat. 411, 50 U.S.C. App. § 1 *et seq.*, as amended by 55 Stat. 839, 50 U.S.C. App. (Supp. V) § 5 (*b*)), the Alien Property Custodian vested in himself the American assets of Interhandel, a Swiss corporation. (Although the corporation is commonly called ' Interhandel ', its full legal name is Société Internationale pour Participations Industrielles et Commerciales S.A., etc. The American assets consisted of bank accounts and over 90% of the capital stock in the General Aniline & Film Corporation of Delaware, all of the assets apparently being valued at more than $100,000,000.00.) Interhandel sued in the district court to recover the assets. The Custodian answered, alleging that the Swiss corporation was dominated and controlled by officers, agents, and stockholders who were engaged in a conspiracy with German nationals and with the German Government to operate the company's business in their interests while we were at war with Germany. Petitioners, United States citizens who own stock in Interhandel, filed a motion to intervene. They admitted the Custodian's charge that Interhandel was dominated by officers and stockholders who had been engaged in such a conspiracy. They also admitted the right of the Custodian to retain an interest in the seized assets proportional to the stock ownership of enemy stockholders. But petitioners contended that they and other non-enemy stockholders had claims in the corporate assets which it was the corporation's duty to protect. Alleging that the dominant enemy group which had charge of the suit would not press the corporate claim in a manner that would adequately protect the claims of innocent shareholders, petitioners asserted a right to intervene [under Rule 24 (*a*) of the Federal Rules of Civil Procedure, 28 U.S.C.]. Underlying the claimed right of petitioners to intervene was the question of the power of the Alien Property Custodian under the Trading with the Enemy Act, namely: What part of the assets of a corporation organized under the laws of a neutral country may the Custodian retain where part of the corporate stock is owned by enemies, part by American citizens, and part by non-enemy aliens ? "

Held (by the District Court) : that the motion to intervene must be denied on the ground that " whether the petitioners predicate their motion to intervene either upon a representative or a derivative foundation, they are without proper status in either category to support their petition. . . . Where the Custodian seized the assets of a corporation dominated by the enemy, no right to intervene exists on behalf of non-enemy stockholders."

On appeal,

Held (by the Court of Appeals) : that the denial of the motion to intervene must be affirmed. The basis for the affirmance was the failure of petitioners to establish their status as interested parties in a suit by a corporation in which they were stockholders under the technical rules of law governing stockholders and their legal relationship to the corporation as a separate entity.

On *certiorari*,

Held (by the Supreme Court, Vinson C.J., Reed and Minton JJ., dissenting) : that the motion to intervene must be granted. The Court said :

". . . (U)nder the 1941 amendment (to the Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App. § 1 *et seq.*, as amended by 55 Stat. 839, 50 U.S.C. App. (Supp. V) § 5 (*b*)),

Case No. 161 *Contd.*

the non-enemy character of a foreign corporation because it was organized in a friendly or neutral nation no longer conclusively determines that all interests in the corporation must be treated as friendly or neutral. The corporate veil can now be pierced. Enemy taint can be found if there are enemy officers or stockholders ; even the presence of some non-enemy stockholders does not prevent seizure of all the corporate assets. But such a governmental seizure requires consideration of the plight of innocent stockholders. For as stated in [*Uebersee Finanz-Korporation, A.G.* v. *McGrath* : see *International Law Reports*, 1952, Case No. 126] the amendment does not contemplate appropriation of friendly or neutral assets. While Congress has clearly provided for forfeiture of enemy assets, it has used no language requiring us to hold that innocent interests must be confiscated because of the guilt of other stockholders. Nor does any legislative history pointed out persuade us that Congress intended to inflict such harsh consequences upon the innocent. We decline to read such a congressional purpose into the Act.

" Our holding is that when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected. This holding is not based on any technical concept of derivative rights appropriate to the law of corporations. It is based on the Act which enables one not an enemy as defined in § 2 to recover any interest, right or title which he has in the property vested. The innocent stockholder may not have title to corporate assets, but he does have an interest which Congress has indicated should not be confiscated merely because some others who have like interests are enemies.

" Section 9 (*a*) of the Trading with the Enemy Act authorizes Interhandel to maintain this action for the recovery of all its assets because it has alleged that it is not enemy dominated. Alleging that they and others are non-enemy stockholders, petitioners charge that it is Interhandel's corporate duty to assert a claim for the return of their proportionate interests in the assets even though other stockholders who dominate the corporation are found to be enemies. Petitioners further allege that the corporate management refuses to assert such a claim, but continues to claim only a return of all assets on the theory that whatever return is obtained must be divided among enemy and non-enemy shareholders in proportion to their stockholdings. This position is taken, petitioners charge, because the suit is being controlled by the very stockholders on whose account the Custodian seized the property and whose interests will be worthless if they are found to be enemies. Petitioners allege that this enemy corporate management, fearing confiscation of its enemy-tainted interests, is about to settle the corporate claim with the Custodian for an amount less than the value of the non-enemy part of the assets. Should this be done, it is said the enemy management contemplates dividing the proceeds proportionately among enemy and non-enemy stockholders, thus violating the Act in two ways: (1) by depriving non-enemy stockholders of part of their property, and (2) by returning assets to foreign enemy stockholders.

" A mere narration of the allegations shows that petitioners' fears are by no means fanciful. Indeed, the Government agrees with the dominant corporate management that the interests of enemy and non-enemy stockholders should be treated alike. The United States wishes to sell the entire assets of Interhandel. And it is agreed that if non-enemy stockholders are to be given a chance in court (which right is challenged), they should be limited to individual suits for money judgments against the Custodian. Petitioners claim a proportional right or interest in the specific assets of Interhandel and that they may not be driven to accept their share of whatever price the Government may happen to get from a sale of these valuable assets. In order to play safe, petitioners have filed a separate suit in a Federal District Court. But we think the questions involved in disputes like this can be more appropriately resolved in the corporate actions authorized by § 9 (*a*) than by resort to a multiplicity of separate actions. In such suits the non-enemy stockholder in his own right may assert his non-enemy character in order to protect his own interest from the enemy taint caused by other stockholders. Courts trying such corporate actions have adequate power and procedural flexibility to protect all interests, even when the corporate recovery is not for the benefit of all stockholders but only for those who are non-enemies.

" In view of our holding that Congress has recognized that non-enemy stockholders of non-enemy foreign corporations have a severable interest in corporate assets seized by the Custodian, it follows that the allegations of these petitioners entitle them to intervene. These allegations, if true, show that petitioners' interests may be inadequately represented and that they may be bound by a judgment in this corporate action. This brings the claim of intervention squarely within Rule 24 (*a*) (2) of the Federal Rules of Civil Procedure [28 U.S.C.]."

Reed J., in a dissenting opinion in which Vinson C.J. and Minton J. joined, said:

" The definition of enemy in the Trading with the Enemy Act leaves innumerable paths for stockholders sheltered by the Court's decision to escape responsibility for the acts of the corporate agency that their investments have made powerful and efficient to undermine our security.

" The Court's holding permits foreign sympathizers, residents of the United States or neutral territory, not covered by the definition of enemies, to avoid sacrifice in war of their financial interests through the trite scheme of investment in

Case No. 161 Contd.

neutral corporations, controlled and used by our enemies for our defeat.

"The Court's holding disregards the normal incidents of corporate responsibility. . . ."

[Reports: 90 F. Supp. 1011; 88 App. D.C. 296, 188 F. 2d 1017; 343 U.S. 847, 72 Sup. Ct. 611, 96 L. Ed. 853.]

NOTE.—The following citations are to decisions on other phases of the Interhandel litigation: 8 F.R.D. 565; 9 F.R.D. 263, 680; 86 App. D.C. 157, 180 F. 2d 406; 11 F.R.D. 294; 88 App. D.C. 275, 188 F. 2d 1011; 14 F.R.D. 44; 15 F.R.D. 83; 111 F. Supp. 435. The instant decision in the District Court was noted in *American Journal of Comparative Law*, 2 (1953), p. 536; *Annual Survey of American Law*, 1952, p. 14; *Harvard Law Review*, 66 (1953), p. 1316; *Yale Law Journal*, 62 (1953), p. 1248.

vii.—Trading with the Enemy

War—Trading with the Enemy—Trading with the Enemy Act' 1939—Inchoate Sale Agreement Made before Act but Retroactively Validated after Act—Whether within the Mischief of the Act—Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939—Purpose of the Act—Enemy character of Copyright Owner—Effect of Act on his Power to Grant Licences—Powers of Comptroller under the Act.

See Case No. 11 (*Novello & Co. Ld.* v. *Hinrichsen Edition Ld.*).

Trading with the Enemy—British Trading with the Enemy Act, 1939—Enemy Property—Property "belonging to or held or managed on behalf of" an Enemy—One-Man Company—Whether Status of Shareholders Material.

See Case No. 40 (*Bank voor Handel en Scheepvaart N.V.* v. *Slatford*).

VI.—Enemy Character

i.—Of Individuals

Enemy Character—Of Persons Residing in Enemy-Occupied Territory—Test of Enemy Character—Persons Living Across the Line of War—Test to be Applied—Whether the Same as That Applied in Circumstances of Trading with an Enemy—Effect of War on Contracts—Power of Attorney—The Law of Hong Kong—The Law of England. **Case No. 162**

HANGKOM KWINGTONG WOO *v.* LIU LAN FONG
(*alias* LIU AH LAN).

British Commonwealth, Judicial Committee of the Privy Council, on appeal from the Supreme Court of Hong Kong (appellate jurisdiction).

(Lord Simmonds, Lord Normand, Lord Oaksey, Lord Radcliffe, and Rinfret C.J. (of Canada).)

July 23, 1951.

THE FACTS.—The appellant, who had hitherto resided in Hong Kong, left there in 1942, during the Japanese occupation of Hong Kong, which ended on September 1, 1945, and went to live in China, which country was then in alliance with His Majesty. The appellant resided in a part of China which was not under the Japanese occupation and was therefore not enemy, or enemy-controlled, territory. Before he left Hong Kong he empowered a person there to act as his attorney, authorizing him to sell real or personal property belonging to the appellant. In 1943 the agent thus empowered contracted to sell certain real property of the appellant in Hong Kong to the husband of the respondent. The purchase money was paid and certain documents were executed to give effect to this transaction, but in the absence of requisite registration the conveyance remained incomplete. The purchaser died in May 1946. Thereafter his widow and executrix (the respondent) brought an action against the appellant (who returned to Hong Kong in February 1946) claiming specific performance of the contract. The appellant pleaded, *inter alia*, that at all material times he and his attorney were divided by the line of war, and that therefore the power of attorney was cancelled or abrogated and that he was therefore not bound by the contract or the documents which the attorney had purported to execute on his behalf. The Supreme Court of Hong Kong, on February 25, 1949, gave judgment for the respondent and decreed specific performance of the contract, and this was affirmed by the Court

Case No. 162 *Contd.* of Appeal (of the Supreme Court) of Hong Kong, on June 10, 1949. The appellant appealed from this decision to the Judicial Committee of the Privy Council.

Held: that the appeal must be dismissed. Citizens of one State who were divided temporarily by the line of war were not necessarily enemies, or subjects of the enemies, of one another. The question must be approached by examining the principle on which at common law trading with the enemy was held to be illegal. The common feature of every statement of that principle and its reason was that the person with whom intercourse was illegal was regarded as an enemy. The test to be applied by which enemy character was to be determined for the purposes of the present case was that which the law laid down in dealing with trading with the enemy. A person residing in territory occupied by an enemy was not necessarily endowed with enemy character.

The Board said (*per* Lord Simmonds) :

" The first defence to the claim is that at all material times the appellant and Chan were divided by the line of war, the appellant being in Free China, then in alliance with His Majesty, and Chan being in enemy-occupied territory, and that therefore the power of attorney was cancelled or abrogated and the appellant was not bound by documents which Chan purported to have executed on his behalf. On this interesting and difficult question their Lordships have not the advantage of a judgment of the Supreme Court in this case, for that court rightly considered itself bound by its own previous decision in Appeal No. 12 of 1948, to which reference will be made.

" The argument for the appellant is thus stated in his formal case. It is that no relevant ordinance dealing with the matter existed in Hong Kong, and that the principles of the common law of England were applicable and thereby during the Japanese occupation of Hong Kong the residents of Hong Kong became enemies of His Majesty and his allies and were shut off from communication and commercial dealings with those resident in His Majesty's free territories or in the unoccupied territory of an ally of His Majesty, and in particular the relationship of principal and agent between the appellant and Chan was determined as soon as they were divided by the line of war.

" To this contention the respondent replies, first (relying on the authority of *Tingley* v. *Müller* [1917] 2 Ch. 144) that by the common law of England a general power of attorney given by a British subject residing within His Majesty's allegiance to one who is, or becomes, an enemy of His Majesty is not abrogated or avoided by the outbreak of war, and secondly, that there is no principle of the common law of Hong Kong, which the courts of Hong Kong administer, which constrains them to treat the residents of Hong Kong when that territory is in enemy occupation as for all purposes divided by the line of war from former residents who have escaped to some part of His Majesty's Dominions, or to the territory of an ally. This latter plea will first be examined by their Lordships, for in a certain event it will be unnecessary to express a final opinion on the former.

"As has been said, the Supreme Court of Hong Kong rejected the contention of the appellant on the authority of its own previous decision in Appeal No. 12 of 1948, and it is convenient to examine that case in which Sir Leslie Gibson C.J. delivered a valuable and penetrating judgment. The facts there, so far as they need to be stated, were that during the Japanese occupation of Hong Kong two members of a partnership which carried on business there escaped to Free China and the remaining members remained in Hong Kong and continued to carry on the partnership business. The partners were thus said to be divided by the line of war, and the question was whether from the time of such division the partnership was by the law of Hong Kong *ipso facto* dissolved.

"The Chief Justice accepted the view that the Colony of Hong Kong was the victim of a Japanese occupation and not of a mere invasion, and he further, on a consideration of the authorities, agreed that according to the common law of England a partnership is automatically dissolved if at the outbreak of war one or more partners are in England and the other partner or partners are in enemy territory, which for this purpose includes enemy-occupied territory, and that the same principle applies if after the outbreak of war one or more partners go to enemy territory while the other partner or partners remain in England, and that residents in allied territory are on the same footing as residents in England for the purpose of these principles. 'No doubt too', said the Chief Justice, 'the common law in so far as it forms part of the law of Hong Kong would be similarly interpreted here in ordinary times.' 'But', he added, 'the question I have to ask myself is "How would the common law—as part of the Law of Hong Kong—be interpreted in Hong Kong while the Colony was under enemy occupation?"'

"After examining the basis of the principles which he had discussed, he says: 'To support his argument that the partnership in this case was dissolved, Mr. Wright must go further, and his further proposition is not supported by authority. He must argue that under the law of Hong Kong (*a*) residents in Hong Kong became enemies on the Japanese occupation of Hong Kong, and (*b*) residents in Free China were therefore unable to communicate with them or remain in contractual relations with them. I am unable to accede to these propositions. The law of England regards occupied Hong Kong as enemy territory, but it seems impossible to contemplate that the law of Hong Kong itself (and Mr. Wright must rely on the common law as forming part of the law of Hong Kong) could

Case No. 162 *Contd.*

operate to turn all the residents of the Colony into enemies. Could it, for example, by turning them into enemies preclude them from suing in their own courts ? It might be that under some law of the Japanese administration (no such law has been established) the principle was applied in reverse on the basis that Free China became the enemy, but in that case the result would flow from the Japanese law and not from the common law as in force in Hong Kong.' Their Lordships have thought it proper to set out these passages from the judgment of the Chief Justice at length because they appear to go to the heart of the matter.

" It is constantly to be borne in mind that it is the law of Hong Kong which is to be administered, and the question therefore is : assuming that the common law of England in regard to trading with the enemy prevails in the Colony, what is the common law of England in this matter if England is itself enemy-occupied territory ? To ask this question is to plunge into the unknown. But on the answer to it depends the issue what is the law of Hong Kong when Hong Kong is in enemy occupation. The researches of counsel on either side were unable to bring to their Lordships' notice any case-law or institutional writings which were of real assistance. This was perhaps inevitable, since the soil of England has not within the period of the development of the common law in this matter been occupied by the enemy. Nor, though the same problem must in recent times have arisen in occupied Europe, can it be said that such a universal rule has been evolved that it ought to be adopted as part of the municipal law of England or Hong Kong. In these circumstances it appears to their Lordships that the problem must be approached, and, if there is a solution, solved, by examining the principle on which at common law trading with the enemy is held to be illegal and, indeed, criminal, and then asking whether on that principle the courts of England (if England were occupied territory) or of Hong Kong, as in the present case, are bound to hold that contractual relations are abrogated between its citizens who are temporarily divided by the line of war. Their Lordships at this stage make no distinction between the relationship of partner to partner and of donor to donee of a power of attorney.

" The basis of the principle is variously stated : their Lordships would refer to Professor McNair's treatise on *Legal Effects of War*, 3rd ed., p. 171 *et seq.*, as containing an accurate and adequate exposition of this matter, and in the following observations borrow freely from it. In *The Hoop* (1799) 1 Ch.Rob. 196, 198, Lord Stowell could refer to the principle as ' a general rule in the maritime jurisprudence of this country, by which all subject's trading with the public enemy, unless with the permission of the Sovereign, is interdicted ' ; while a few years later a learned American judge in *The Rapid* (1814)

8 Cranch 155 could say: ‘The individuals who compose the belligerent States, exist, as to each other, in a state of utter occlusion. . . . Every individual of the other nation is his own enemy—because the enemy of his country.’ Other reasons, too, were ascribed by Lord Stowell, as, *e.g.*, the procedural disability, shared by enemies generally, which precluded an appeal to the tribunals of one country on the part of the subjects of the other, and ‘the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that, had the means of carrying on any other species of intercourse he might think fit’ (1 Ch. Rob. 200), an aspect of the matter which has frequently been emphasized in later authorities. And this is closely linked with the reasoning of Willes, J., in *Esposito* v. *Bowden* (1857) 7 E. & B. 763, who there founds the prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country on ‘the presumed object of war being as much to cripple the enemy's commerce as to capture his property’.

“But it is to be observed that the common feature of every statement of the principle and its reason is that the person with whom intercourse is illegal is regarded as an enemy by the court which has to determine the illegality. This is most clearly shown in connexion with the rule as to the procedural disability which attaches to enemies. At once the question arises, how this doctrine can be applied in the courts of an enemy-occupied country. To take the present case, whom were the courts of occupied Hong Kong to regard as an enemy, to whom deny persona standi in judicio? Presumably not to the appellant, who had escaped from the occupied territory and sought refuge amongst the King's allies: to him no taint of enemy character could attach. To Chan, then, the attorney, who remained in Hong Kong? But to whom, if not to Chan, were the courts of Hong Kong open? The result seems plainly to ensue that, whatever consequences may follow outside the occupied territory if one of its inhabitants, who has left it, seeks to maintain or to initiate relations with another who has stayed within it, yet the courts of that country cannot regard either him who has left or him who has stayed behind as enemies of the King or enemies of each other. This result may perhaps be tested thus. Suppose that the appellant had, instead of going to the territory of an ally, gone to Japan and thence sought to maintain some contractual relations with Chan. Then, apart from any regulation which the occupying Power might lawfully make, a court of Hong Kong would be bound to treat him as an enemy, to deny him access to its presence and to treat the contractual relation as determined. Is he then to be regarded as an enemy to whatever territory, British, allied or enemy, he goes?

Case No. 162 *Contd.*

" Enough has been said on this aspect of the case to show that there is a wide divergence between the problems which face the courts of a belligerent Power and of an occupied territory.

" No less striking is the difference in the conditions which must determine whether a particular class of contract should be abrogated. The general grounds of abrogation are, broadly speaking, the danger of intercourse and the desire not to enhance, but to cripple, the resources of the enemy. Often it might be said of this or that communication or of this or that relationship that it could not possibly redound to the advantage of the enemy but rather must benefit this country : yet it is illegal and void, for it cannot be left to the individual to judge what may or may not be harmful or beneficial to his country.

" Let it be assumed (contrary to the contention of the respondent) that such a relation is that which is established by the grant of a general power of attorney. Yet how different an aspect must such a transaction wear if it takes place in an occupied country. New considerations at once arise which had no place in the formulation of the general rule of law. Is it in the interest of the King that, when British territory is occupied by the enemy, its able-bodied or skilled inhabitants should escape across the line of war and continue to render him service ? No one would deny it nor give little weight to such a consideration, remembering what is owed to those who, when Europe was overrun, thought it their duty to carry on the fight from English shores. If, for such men, that is their right, or, as some would say, their duty, does public policy demand that, doing it, they should leave their affairs unattended by any responsible agent lest it should be said that, placing them in the hands of a lawful attorney, they were guilty of illegality and crime ? If it were so, it would be a powerful deterrent against them rendering the service to the King which they could usefully continue to render. Their Lordships do not think it necessary to assess the general advantage or disadvantage of endeavouring to apply in the courts of Hong Kong the rigid rules of the common law which might have to be applied outside the Colony in regard to a transaction taking place within it. The purpose of their observations is to show that the contentions of the appellant involve a grave extension of the common law, and that the extension means not merely the application of old principles to new circumstances or their adjustment to fresh needs, but the rewriting of them in conditions in which their foundations are shaken. In those circumstances their Lordships are of opinion that the judgment of the court of Hong Kong should be upheld.

" It becomes unnecessary to determine whether a general power of attorney is an instrument of a kind which must in ordinary cases be regarded as abrogated when donor and donee are divided by the line of war. For, even if it is, it is not, as their Lordships hold, to be regarded as abrogated in the extraordinary case now under appeal. It is sufficient to say that *Tingley* v. *Müller* [1917] 2 Ch. 144, on which the respondent strongly relied as authority for the proposition that such an instrument remains of full force and effect notwithstanding the division of war, is difficult to reconcile with later cases and has itself been the subject of criticism in the highest tribunal.

" But in addition to the defence with which their Lordships have just dealt the appellant also raised two pleas which must now be considered : (1) that by reason of certain events, which will next be mentioned, there was such a change of circumstances as to frustrate the agreement and render its performance in the manner contemplated by the parties impossible ; and (2) that, in any case, in view of the hardship which would be imposed on the appellant the equitable remedy of specific performance should be denied to the respondent.

" For the consideration of these pleas some further facts must be stated. As has already been noted, the property was subject to a first and second mortgage in sums expressed in terms of Hong Kong dollars. In September and October, 1943, these mortgages were paid off in military yen at the prescribed rate of exchange ; it was not permissible to pay them off in any other currency. Thus, but for the passing of the Ordinance of 1947, to which reference will next be made, the way was clear for an assignment of the property free of incumbrances to which the purchaser was entitled. And, in fact, such an assignment was at some date towards the end of September, 1943, executed by Chan in favour of the purchaser. In this document the consideration was stated to be 272,000 Hong Kong dollars, a fact at one time relied on by the appellant but no longer relevant in view of the finding of fact by the Chief Justice that the agreement was for a sale for military yen and nothing else. This assignment was not, and for obvious reasons could not be, registered at the Land Office of Hong Kong.

" In 1948 there was passed by the Hong Kong legislature the Debtor and Creditor (Occupation Period) Ordinance, 1948 (being Ordinance No. 24 of 1948). It is not necessary to refer at length to the terms of this Ordinance, and in particular it is not desirable, since the mortgagees are not parties to the proceedings, to attempt to define their rights under it against the appellant or the respondent or the property. But it is at least clear, as it is alleged by the appellant and made the ground of defence by him, that the result of the Ordinance is that, while it imposes on the purchaser no obligation to pay to the appellant any sum beyond the military yen already paid, yet it renders the latter liable to pay to the mortgagees a large sum in Hong Kong dollars beyond the military yen already paid in purported full discharge of the mortgage debts.

Case No. 162 *Contd.*

" On these facts the appellant raises the plea of frustration, a plea rejected by the Chief Justice and by the Full Court on appeal. Their Lordships so fully agree with their reasons and conclusion that they can state their own view very shortly. It is beyond question that the passing of the Ordinance placed on the appellant a burden not contemplated by him or by the purchaser at the date of the agreement. This is put somewhat graphically by saying that, whereas it was contemplated that the mortgages would be fully discharged out of the purchase money and there would be a balance left over for the appellant, not only is there no balance left for him but he will lose his property and may still remain liable in substantial sums to the mortgagees. That this is an event not contemplated by him or his attorney is certain, though there is no evidence that the purchaser was aware that the property was mortgaged. But the question is whether this change of fortune is to be regarded as so fundamental as to strike at the root of the agreement and render its performance in the manner contemplated by the parties impossible. In their Lordships' opinion it clearly is not. The purchaser has long since fulfilled his part of the agreement: the appellant as vendor can fulfil his part by the execution of a single document. It is therefore not a case where performance has become impossible. Nor, if as the result of the Ordinance the appellant has not obtained the advantage from the agreement that he had expected, can this be deemed a change of circumstances so fundamental as to satisfy the test laid down by Viscount Simon in *Cricklewood Property and Investment Trust Ltd.* v. *Leighton's Investment Trust Ltd.* [1945] A.C. 221, 228, which test was, as their Lordships think, correctly applied by the Supreme Court of Hong Kong.

" The final plea, with which their Lordships must deal, is that equitable relief should be refused on the ground of hardship to the appellant. The Full Court cited with approval that part of the judgment of the Chief Justice which dealt with this plea and, as their Lordships respectfully think, his reasoning and conclusion are unimpeachable. That the appellant in the events that happened made a bad bargain is clear enough. That resulted from the fact that the Hong Kong legislature deliberately enacted that in some cases there should, and in others there should not, be a revaluation of debts incurred or discharged in military yen. The appellant would have been in no better position if the transaction of sale had been fully performed before the Ordinance came into operation. It does not appear to their Lordships that any good reason has been shown why the court should, by denying to the purchaser, who has performed his part of the bargain, the appropriate remedy of specific performance, in effect add to or alter the carefully thought out provisions of the Ordinance for the adjustment of the rights of certain creditors and debtors. In their Lordships' opinion, therefore, this plea also fails, and they would only add that in any case they would hesitate long before interfering with the exercise of a discretionary jurisdiction by the Chief Justice in which the Full Court concurred.

" They will humbly advise His Majesty that this appeal should be dismissed."

[Report: [1951] A.C. 707.]

War—Enemy Character—Property of Enemy Company—Rights of National, Allied or Neutral Shareholders—The Law of Belgium. **Case No. 163**

GUILMAIN *v.* OFFICES DES SÉQUESTRES.

Belgium, Cour de Cassation. December 15, 1951.

THE FACTS.—This was an appeal by two Belgian nationals, sole shareholders in the German company " Arcos Gesellschaft für Schweisstechnik ", against the sequestration, as enemy property, of the Belgian assets of the company. It was argued on behalf of the appellants that the Law of August 23, 1944, concerning the sequestration of enemy property, rights and interests could not be applied in such manner as to injure Belgian nationals.

Held: that the appeal must be dismissed. The Court said: " Article 1 of the Law of August 23, 1944, interpreted by the Law of August 1, 1945, provides that the property, rights and interests of an organisation or person of German nationality shall be sequestrated by the office established under Article 7. Article 3 provides that only Belgian, allied or neutral persons may sue for the restoration of their property on the ground that the Law has wrongly been applied to their case.

" The fact that the appellants are Belgian nationals and sole shareholders in a German company which owns the sequestrated property did not, at the time of the contested decision, justify the restoration of the property. The sequestration provided for by the Law of August 23, 1944, is a measure of war bearing on the property, rights and interests of enemy organs or nationals, with a view to their total or partial transfer to the nation, irrespective of any personal obligations of their owner. By Article 8 of the Law, the rigours of that measure had been somewhat attenuated in favour of Belgian, allied or neutral creditors of the owner. However, at the date of the contested decision no similar exception had been made in favour of Belgian, allied or neutral shareholders in an enemy company."

[Report: *Pasicrisie belge* (1952), I, p. 198.]

Enemy Character—Of Persons—Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939—Enemy Character of Owner of Copyright—Whether Once an Enemy Always an Enemy for the Purposes of the Act—Effect of Act on Power of Enemy or Ex-enemy to Deal with his Own Property—Powers of Comptroller under the Act.

See Case No. 11 (*Novello & Co. Ld.* v. *Hinrichsen Edition Ld.*).

War—Enemy Character—Belligerent Occupation—English Common Law—The Law of India.

See Case No. 179 (*Seethalakshmi Achi* v. *V.T. Veerappa Chettiar*).

ii.—Of Corporations

Enemy Character—Of Corporations—Whether Affected by Status of Shareholders—Whether Company's Assets " Belong" to or are " Held or Managed on behalf of " the Shareholders—One-Man Company—Trading with the Enemy Act, 1939—Peace Treaty between United Kingdom and Hungary, 1947—Treaty of Peace (Hungary) Order, 1948.

See Case No. 40 (*Bank voor Handel en Scheepvaart N.V.* v. *Slatford and Another*).

Enemy Character—Of Corporations—Control by Enemy Persons—Incorporation in Enemy State—Trading with the Enemy Legislation—Sequestration of Assets of Bank Having Enemy Character.

See Case No. 203 (*Haw Pia* v. *The China Banking Corporation*).

War—Enemy Character—Of Corporations—Neutral Shareholders in Enemy-Controlled Corporation.

See Case No. 161 (*Kaufman* v. *Société Internationale pour Participations Industrielles et Commerciales S.A.* [*" Interhandel "*]).

iii.—Of Ships

Enemy Character—Of Ships—Whether Ship Condemnable in Prize by Reason of Flag Alone—Ship on Two Registers—Involuntary Enemy Domicile of Owner.

See Case No. 223 (*The Inginer N. Vlassopol*).

iv.—Of Goods

War—Enemy Character—Of Goods—Test of Enemy Control. **Case No. 164**

OFFICE DES SÉQUESTRES *v.* MULS.

Belgium, Cour de Cassation. January 18, 1951.

THE FACTS.—In May 1940 the German occupation authorities in Belgium had seized an estate belonging to the respondent and had administered it until the liberation of Belgium. After the liberation the Office des Séquestres sequestrated the livestock on the estate as enemy property. The rightful owner of the estate appealed against this action. The Court of Appeal of Liège, on July 5, 1949, held that the livestock had been wrongfully sequestrated. It did so on the ground that only property which, despite the liberation, remained under the ownership or the control of the enemy would be regarded as enemy property. The Office des Séquestres now appealed against that decision. It was argued, on its behalf, that all property which was in fact under the control of the enemy at the time of the enactment of the Belgian Law of August 23, 1944, concerning enemy property must be considered to be enemy property within the meaning of that enactment.

Held: that the appeal must be rejected. The Court said :

" The purpose of the Law of August 23, 1944, concerning the sequestration of enemy property, rights and interests, is the taking of economic pledges so as to ensure the subsequent carrying out of the obligations of the enemy State towards Belgium. The very purpose of the Law accordingly limits its scope to the property, rights and interests of the enemy himself.

" While Article 1 of the Law provides for the sequestration not only of property which is *stricto sensu* in the ownership of the enemy, but also of property which is under the control or at the disposal of the enemy, this provision applied only to cases in which the facts show that the enemy has some right or interest in the property.

" In this case the property owned by the respondent was not under the control of the enemy, nor was it at his disposal except as a result of the arbitrary dispossession of the respondent arising from the temporary occupation of Belgian territory."

[Report : *Pasicrisie belge* (1951), I, p. 307.]

VII.—The Binding Force of the Laws of War

War—Laws of War—Binding Force of—Relevance of Illegality of War.

See Case No. 182 (*Aboitiz & Co.* v. *Price*).

VIII.—Enforcement of the Laws of War

ii.—Punishment of War Crimes. Defence of Superior Orders

Case No. 165 **War—Punishment of War Crimes—Offences by One Member of Enemy Armed Forces against Another—Jurisdiction—Criminal Jurisdiction over Foreigners—Offences by One Member of an Occupying Army against Another.**

In re VERHULSDONCK.

Belgium, Cour de Cassation. February 12, 1951.

THE FACTS.—This was an appeal against the decision of a Military Court, of October 23, 1950, convicting the appellant, a German national, of war crimes, in that he did, on February 7, 1944, being then a member of the Security Police attached to the German army, attempt to assassinate one Antonio Milazzi, an Italian member of the same service. It was argued on behalf of the appellant that the military court was not competent to convict the appellant for an act which, even though unlawful, only affected another member of the German armed forces.

Held: that the conviction must be quashed. An offence against another member of the German armed forces did not constitute a war crime. Belgian criminal law did not apply to an enemy army of occupation. The Court said:

"It appears both from the Protocol to the Convention signed at The Hague on October 18, 1907, and approved by Law of May 25, 1910, and from the Rules attached to that Convention, that the laws and customs of war govern the relations of a belligerent State and its organs with the enemy State or a neutral State, or the nationals of the latter, or the inhabitants of their territory, or persons acting on their behalf. Milazzi did not fall within any of these categories, and the offence committed against him accordingly does not constitute a violation of the laws and customs of war.

"Neither can it be argued that the conviction was nevertheless lawful since the offence was committed in Belgium and since, according to Articles 3 of the Civil Code and of the Penal

Code, the laws relating to police and safety are binding on all persons on Belgian territory, whether they be Belgian nationals or aliens. When a belligerent army occupies the territory of the State with which it is at war, the safety of that army and its services is entirely distinct from the safety of the State whose territory is occupied. The authorities of that State are, accordingly, neither bound nor entitled to prosecute or punish unlawful acts committed during the occupation by a member of the enemy army or of its services against a person belonging exclusively to that same army or those same services."

[Report : *Pasicrisie belge* (1951), I, p. 379.]

War Crimes—Superior Orders—Execution of Prisoners of War—Execution Ordered by Police Authorities of Detaining Country—Absence of Judicial Proceedings Preceding such Order—Whether Person Carrying Out Execution Guilty of Criminal Offence—The Law of Germany. **Case No. 166**

EXECUTION OF PRISONER OF WAR CASE.

German Federal Republic, Federal Supreme Court.
December 12, 1950.

THE FACTS.—During the Second World War the accused, a German police official, supervised and took an active part in the execution of a Polish prisoner of war detained in Germany. At the time of the execution, so-called " sentences of death " against, *inter alia*, Polish prisoners of war were " passed " by the German Secret State Police (Gestapo) without prior judicial proceedings, orders for the execution of such persons being the result of purely administrative decisions. The accused was charged with an offence under s. 212 of the German Penal Code which provides for the punishment of a person who, " without being a murderer, intentionally kills a human being ". The trial of the accused resulted in an acquittal, and the prosecution now appealed. On appeal, the Prosecutor contended that the accused ought to have known that the execution of prisoners of war without prior judicial proceedings establishing their guilt was unlawful, and that it was therefore a criminal offence to take part in such an exceution. On behalf of the accused it was contended that the practice of ordering the execution of Polish prisoners of war by means of a purely administrative decision was current and well known in Germany at that time, and that the accused was therefore entitled to regard such an order as lawful.

Held : (i) that, irrespective of whether it was in accordance with or contrary to international law to order the execution of prisoners of war by administrative action, the accused was entitled to believe in the legality of such orders ; (ii) that the

Case No. 166 *Contd.* belief of the accused in the legality of the order for execution negatived any criminal intent, and that the accused was accordingly entitled to be acquitted. The Court said :

" The accused knew when he committed the act that sentences against nationals of Eastern countries were passed and executed by Gestapo offices, and he assumed that a death sentence of the kind here indicated had been passed against K. (the Polish prisoner of war). As the Assize Court has pointed out, the accused had ' no doubt that the competent authority had passed the death sentence after properly conducted proceedings, and that the sentence was final '. This belief of the accused was based on the contents of the written message from his superiors at the Gestapo Office, which was signed by the officer in charge of that office. This message contained more or less the following information : That the Polish citizen K. had been sentenced to death for an offence against the ' Ordinance for the Protection of Custodians of the Law ', and that the Reich Chief Security Office had ordered his execution in the district where the offence had been committed. The fact that there was no such Ordinance is immaterial. What is decisive is the fact that the accused, according to the evidence as found by the Assize Court, believed in a ' sentence ' based on a valid legal provision (though not in a sentence passed by a court of law). He also knew that qualified lawyers were employed at the higher Gestapo offices. At a conference of officials which had previously taken place, attention had expressly been drawn to the fact that at trials before the Gestapo foreign nationals were tried by qualified lawyers acting ' in a kind of judges' senate '. The findings of fact concerning the belief of the accused in the existence of a judgment and the nature of the proceedings preceding such judgment, as well as in the legality of such proceedings and the verdict of guilty against K., support the legal view adopted by the Assize Court, *i.e.* that the accused was convinced, at the time when the act was committed, of the legality of the order for execution given to him by his immediate superiors, the Gestapo office concerned, and was thus also convinced of the existence of grounds justifying his own offence of killing the prisoner. The Assize Court was therefore right in acquitting the accused of the offence of intentional killing, on the ground that he was not conscious of possibly having erroneously interpreted the act he committed. To that extent the appeal is unfounded.

" The main attack of the appeal is directed against the finding of the Assize Court that the accused was not negligent, in law or in fact, in believing that the sentence against the Polish prisoner and the order for the latter's execution were lawful. This complaint, too, is unfounded. The first question raised here need not be determined, *i.e.* the question whether the laws and administrative orders enacted by the Hitlerian

State during the war with regard to the trial of Polish prisoners of war by Gestapo offices, outside the framework of the jurisdiction of courts of law, were lawful. This is a question of international law. At the time when this act was committed, this question could not by any means be quite as clearly answered in the negative as the prosecution contends. It was described as doubtful even after the war—as is rightly observed by the Assize Court—in the judgment of the United States Military Tribunal No. 5 in the case against Field Marshal von Leeb.[1] The only question which is material is whether the accused, having regard to his personal circumstances, could or should have realised the possible illegality of such laws and orders. The Assize Court, having assumed their illegality, was right in law in answering this question in the negative, on the ground that at the time the accused could not be expected, having regard to his personal circumstances, to appreciate the possible illegality under international law and the resulting invalidity of the death sentence of the Gestapo which he was ordered to carry out ; the more so as the accused, in view of the depositions relating to the police interrogation of K., was, and had every right to be, convinced that the Polish prisoner had attacked police sergeant S. and had grasped the latter by the neck, thereby committing an offence punishable by death. Although the accused may have been a particularly able and experienced official of the criminal police, of which he had been a member for 24 years, he did not possess, as the Assize Court found without erring in law, the requisite power of perception to appreciate these questions of constitutional and international law. There are no grounds on which to base the assumption that at the time the accused had any reason to mistrust the officer in charge of the district Gestapo office, a man with a university education. Moreover, before the commission of the offence he had obtained knowledge of the fact, in the course of his practical work, that the administration of justice in respect of Polish citizens had been transferred from the competent judicial authorities to the Gestapo, and that, as far as he was aware, neither public prosecutors nor judges of the criminal courts had resisted such transfer. In this context it is immaterial whether there were any judges or public prosecutors who, exceptionally, resisted such transfer, as long as there is no proof against the accused that he knew of such exceptions. In view of the then existing laws and the critical military situation of the province of Schleswig-Holstein, the accused had no reason to doubt the legality of a death sentence passed against a Polish prisoner of war who had assaulted a police sergeant."

[Report : *JZ*, 6 (1951), p. 234.]

---

[1] *In re von Leeb and Others* (*German High Command Trial*), *Annual Digest*, 1948, Case No. 119.

Case No. 167 *Contd.* **War—Enforcement of Laws of—Punishment of War Crimes—Defence of Superior Orders—Defence of Self-Preservation—Shooting of Prisoners—Traitors.**

MILITARY PROSECUTOR *v.* B. AND VAN E.

Holland, Court Martial. January 2, 1951.

THE FACTS.—B. was the commander of a section of the Dutch resistance movement which had the official status of " binnenlandse strijdkrachten " (B.S.) (internal forces) and which had been recognized as combatants by a Royal Emergency Decree made in London on September 5, 1944 (*Staatsblad* No. E 62). In April 1945 the section joined with a detachment of French parachute troops who had landed in Holland. Shortly afterwards, a number of Dutch Nazis were taken prisoner by the section and charged with murder and acts of treason which they had committed. One of them escaped. As the section was surrounded by German forces, there was a danger that if the latter, with the help of the escaped prisoner, attacked them, the presence in the section of a number of prisoners would present a serious danger for them. B., after consulting with the French commander, decided to execute four of the prisoners. Van E., another member of the B.S., carried out his orders. In 1951, B. and van E. were brought before a Court Martial and charged with murder.

Held: that both the accused must be acquitted.

As regards van E., as a member of the " internal forces " he owed obedience to his commander. In the light of the circumstances under which the order to execute the prisoners was given, van E. was entitled to assume in good faith that his commander was competent to give it and that the order was one which he was bound as a subordinate to carry out.

As regards B., the Court rejected the contention of the Prosecutor that an act which would constitute a war crime if committed against subjects of the enemy should *a fortiori* be such a crime if committed against fellow countrymen. On the contrary, persons who attack or betray to the enemy members of their own forces put themselves in such a position that they cannot invoke the same rights as those to which enemy subjects are entitled. Their legal position must in some circumstances rather be regarded as worse even than that of *francs-tireurs.* This did not imply, however, that it would be lawful to shoot such traitors if, as happened in the case under consideration, the shooting was done not immediately upon their being taken red-handed, but only after a period of captivity. Consequently, the accused acted illegally. B. was, however, justified in assuming with a degree of probability bordering on certainty that the prisoners were persons who, if in a position to do so, would attack his " resistance " group and the French parachute troops, or betray them to the Germans. The situation in which B. and his section found themselves was such that, should one of them fall into the hands of the enemy, it would certainly cost him his life, since it was notorious that the enemy refused to regard members of such groups as regular combatants and would not be prepared to treat them as such. Moreover, the views of his section and of the French parachute troops concurred in holding that the execution of the pro-Nazi prisoners was not illegal in the given circumstances. This attitude was supported by the instructions which in those days were in force for the B.S., and was in accordance with the general impression given by the " Orange " wireless from London that the Government also regarded pro-Nazis as traitors. The accused was honestly convinced that he was right in acting as he did, so that there was in his mind no consciousness of the unlawfulness of his action. The accused was forced to take his decision without any possibility of consulting a superior, and he was placed in a position for which he had not been prepared and in circumstances in which a calm weighing of interests was impracticable, so that it cannot even be said that he ought to have been conscious of the illegality of his act. B. therefore, at the crucial moment, was under a genuine misapprehension about the lawfulness of his action and, in consequence, must be acquitted.

[Reports: *N.J.*, 1951, Nos. 246 and 247, with a Note by Professor Röling.]

NOTE.—In Professor Röling's Note this judgment of a Court Martial (*krijgsraad*) is compared with judgments rendered by several Special Criminal Courts set up for the trial of German war criminals, in particular the judgments in *In re Beck*, decided on April 11, 1949 (*N.J.*, 1949, No. 437; *Annual Digest*, 1949, Case No. 93); *In re Wintgen*, decided on July 6, 1949 (*N.J.*, 1949, No. 540; *N.O.R.*, V, No. 1535; *Annual Digest*, 1949, Case No. 178); and *In re Frölich*, decided on November 13, 1948, confirmed on appeal October 17, 1949 (*N.J.*, 1950, No. 6; *N.O.R.*, V, No. 1618; *Annual Digest*, 1949, Case No. 139).

War—Enforcement of Rules of—Punishment of War Crimes—Defence of Superior Orders—Shooting of Prisoners of War. **Case No. 168**

In re TITHO.

Holland, District Court (Special Criminal Chamber) of Utrecht.
May 24, 1951.

THE FACTS.—In April 1942, Titho, a member of the German S.D. (Security Service), was ordered to take part in the shooting

Case No. 168 *Contd.* of a number of Russian prisoners of war in a concentration camp near Amersfoort (Holland). The Russian soldiers concerned, about a hundred in number, had arrived in the camp at the end of 1941; they were in a very bad state of health, exhausted and underfed, and their condition gradually deteriorated. The order to shoot the prisoners was given by the German occupation authorities at the highest level to Dr. Harster, the then Commander of the German S.S. (Security Police) and S.D. in Holland, who communicated it down the chain of command to the Camp Commander at Amersfoort. The true reason why the order was originally given was not quite clear: there was some evidence to the effect that the prisoners were unlikely to survive because they had an infectious disease; other evidence suggested that they were murdered as a reprisal for the treatment of German prisoners of war in Russia. Some sixty-five prisoners were shot, from behind, on the edge of graves which had been dug in advance by Titho and others.

Held: that the accused was guilty of a war crime and a crime against humanity. He had not the excuse that he was not fully aware of the nature of the act. Despite his subordinate position, superior orders did not afford a defence though they might be taken into account as a mitigating circumstance in passing sentence.

[Unreported.]

NOTE.—The accused was sentenced to six years' imprisonment.

Case No. 169 **War Crimes—Crimes Against Humanity—Crimes Against the Jewish People—National Group of Accused and National Group of Victims—London Charter of 1945 and Control Council Law No. 10—Punishment by Israel of War Crimes and Crimes Against Humanity.**

WAR CRIMES CASES (ISRAEL).

In 1950 the Knesseth passed the Nazi and Nazi Collaborators (Punishment) Law, 5710–1950 (see *Yearbook on Human Rights for 1950*, p. 163), by which the following acts were made criminal offences: (*a*) acts constituting a crime against the Jewish people, committed during the period of the Nazi régime in any enemy country [1]—the acts themselves being more closely defined in the Law; (*b*) crimes against humanity defined as any of the following acts: murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population; and also persecution on national, racial, religious or political grounds; and (*c*) war crimes, *i.e.*, any of the following acts: murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity—all these offences being punishable by the death penalty (s. 1). Certain actions which are criminal offences under the Israel Criminal Code were declared to be offences under the Law so that persons who committed those acts in the period of the Nazi régime against a persecuted person as a persecuted person, were liable to be tried and, if found guilty, were liable to the punishment provided for in Israel law had the act been committed in Israel (s. 2). Membership in an " enemy organization ", as declared by the International Military Tribunal at Nuremberg, was punishable with imprisonment not exceeding seven years (s. 3), while s. 4 made certain actions by persons who exercised some functions in a place of confinement also punishable, if those actions were included within certain provisions of the Criminal Code. The principal judicial decisions in Israel have concerned the distinction between the acts liable to the death penalty under s. 1 of the Law, and those liable to the lesser penalties under ss. 2 and 4.

---

[1] "Enemy country" means Germany during the period of the Nazi régime; any other Axis State during the period of the war between it and the Allied Powers of the Second World War; any territory which was *de facto* under German rule or under the *de facto* rule of any Axis State, during the period it was under such *de facto* rule. "Axis State" means a State at war, during the Second World War, with the Allied Powers. The Second World War is the period between September 1, 1939, and August 14, 1945, while the period of the Nazi régime was the period between January 30, 1933, and May 8, 1945 (s. 16).

In *Attorney-General* v. *Tarnek*, decided by the Tel Aviv District Court on December 14, 1951, the Court, in a case involving a charge of " murder, ill-treatment or deportation to slave labour or for any other purpose " in the definition of war crime, explained that:

" This definition is taken from Article 6 (*b*) of the London Charter. . . . The International Military Tribunal was empowered, by Article 27, to impose the death penalty or any other punishment.

" While our law includes also provisions regarding less heinous offences than war crimes and crimes against humanity, that is crimes against persecuted persons (s. 2) and crimes in places of confinement (s. 4), in the London Charter no corresponding provisions appear, and for the most part those offences were included in the notion of war crime or crime against humanity contained in Article 6. These differences between the Law and the Charter, and the fact that an Israel Court must impose the death penalty for every war crime while the International Military Tribunal had, under the Charter, a

Case No. 169 Contd. broad discretion in the matter of punishment, lead us to the inescapable conclusion that the Israel legislator could not have intended to comprise within the definition of war crime, within the meaning of s. 1 of the Law, all actions which might have been considered war crimes under the Charter, despite the fact that they were not heinous enough to be included within our definition. In other words, while the definition of the Charter includes groups of crimes which differ from one another in gravity, although having in common that they are all crimes according to international law and therefore were brought within the jurisdiction of the International Tribunal, in Israel the fact that the death penalty is reserved only for the crimes mentioned in s. 1 is an indication that the legislator intended to regard as war crimes only the most serious offences."

On that basis the Court held that physical violence against prisoners in a concentration camp did not constitute a " war crime ", although each single act of violence constituted some other offence.

After finding that civilians confined in a place of confinement did not lose their status as members of the civilian population, the Court interpreted the words " other inhumane acts " appearing in the definition of crime against humanity as applying only to such other inhumane acts as resembled in their nature and their gravity those specified in the definition ; and the Court approached this aspect on the same basis as it had approached the problem of war crime.

[Report : *Pesakim Mehoziim*, 5 (1951–1952), p. 142.]

In *Attorney-General* v. *Enigster*, decided by the same Court on January 4, 1952, the Court made the following comments :

" In preparing the Law the legislator had before him the Allied legal dispositions made after the Second World War in connexion with the trial of Nazi war criminals, that is to say the London Charter and Allied Control Council Law No. 10. In both of those documents too, war crime and crime against humanity are defined, and apparently the definitions contained in our Law are, in their essential features, with changes of no concern to us here, taken from these two documents. . . ."

On the basis of this approach the Court reached certain interpretations of the Hebrew text of the Law, and found that the acts committed by the accused came within the category of " acts of ill-treatment ". The Court went on :

" But we accept the plea of the defence that the accused ought not to be convicted since both he and his victims belonged to the same persecuted nation. True, a strict interpretation of the Law does not perhaps disclose such a restrictive intention, but comparison of the definition of war crime with that of crime against humanity shows that while, in the latter instance, the legislator referred simply to ' civilian population ', in the former he used a broader formulation—' civilian population of or in occupied territory '. From this it follows that at all events the victims of a war crime must be nationals of an occupied territory, while this is not necessary in the case of a crime against humanity which may be commited against any civilian population. True, these different formulations are not themselves sufficient to justify an assertion that they include a difference in regard to the national character of the criminal in relation to the national character of the victim. But the Allied Military Tribunals which functioned on the basis of the London Charter and Law No. 10, when faced with the problem of the distinction between war crime and crime against humanity, established this difference."

The Court here quoted from p. 135 of volume 15 of the *Law Reports of Trials of War Criminals*, and continued :

" Since in this respect the difference between war crime and crime against humanity appears to the same extent in our Law as in the London Charter and Control Council Law No. 10, it is appropriate for us to follow that precedent and to maintain the distinction here. True, it is possible to find a man guilty of a war crime even though he is of the population of occupied territory and possesses the same national character as his victims, if his actions show that he identified himself with the Occupant. But in the present case that identification has not been established.

" As to crimes against humanity, we have no hesitation in rejecting the argument of the defence that any of the acts detailed in the definition of crime against humanity have to be performed with an intention to persecute the victim on national, racial, religious or political grounds. It is clear that this condition only applies when the constituent element of the crime is persecution itself. The legislator found it necessary to separate persecution from the other types of action by a semicolon, and to precede the word ' persecution ' with the words ' and also ', thus clearly establishing that persecution stands by itself, and that it alone is subject to that condition. On the other hand, we accept the argument that ' other inhumane act ' must comprise an act of the kind specified in the definition of crime against humanity. . . . It is clear to us that the singling out specifically of murder, extermination, etc., of any civilian population was done with two objects in mind : (*a*) to show that the act must be one of a serious character and likely to embitter the life of a human being, to degrade him and cause him great physical or moral pain and suffering ; (*b*) to show that the act must be performed against a civilian population on a broad scale and systematically, as distinct from isolated acts, so that it arouses the conscience of mankind against it. In this context it may be pointed out that the Allied courts when faced with

Case No. 169 *Contd.* the problem of determining what inhumane acts constitute crimes against humanity held that systematic undermining of human dignity was also a crime against humanity.

". . . In our opinion a person who was himself persecuted and confined in the same camps as his victims can, from the legal point of view, be guilty of a crime against humanity if he performs inhumane acts against his fellow prisoners. In contrast to a war criminal, the perpetrator of a crime against humanity does not have to be a man who identified himself with the persecuting régime or its evil intention."

Judge Lamm dissented from the remarks of the Court on the question of crimes against humanity, pointing out that in fact there was a difference between the London Charter in its original and amended form, Control Council Law No. 10, and the Israel Statute. In his view the London definition was exclusive, and that of the Control Council Law *exempli causa.* The Israel Law was apparently exhaustive, but did not exclude a broader interpretation, *exempli causa.* Although the Law contained no specific mention of the intention of the accused, the Court had to take that into account as one of the elements.

[Report : *Pesakim Mehoziim,* 5 (1951–1952), p. 152.]

The issue was partly resolved by the Supreme Court sitting as the Court of Criminal Appeals, in *Pal* v. *Attorney-General,* decided on June 6, 1952, where it was *held* that the word " collaborators " in the title of the Law did not mean only collaboration for conscientious or ideological reasons. The Court said :

" If we compare s. 1 with s. 2 we shall see that all the offences contained in s. 2 appear also in s. 1, either in the definition of crime against the Jewish people or in that of crime against humanity, except that in s. 2 they are in somewhat broader terms. . . . The real difference is that s. 1 refers to crimes against a group (civilian population) and s. 2 to crimes against individuals. But even by s. 1 a man can be convicted in respect of an act committed against individuals, if the act was committed with the intention of harming the group and the crime was in part performance of the evil intention against a whole group, whether the Jewish people or any other civilian population. (It may be mentioned that ' civilian population ' is a broad term which includes also part of a civilian population belonging to a national, religious, racial or political group. For instance, in a town where the majority of the population were Nazis, acts of extermination of a Polish minority would be acts of extermination of a civilian population.) The question whether the accused had that intention is one of fact."

[Reports : *Piskei-Din,* 6 (1952), p. 498 ; *Pesakim Elyonim,* 5 (1951–1952), p. 409.]

In *Honigman* v. *Attorney-General,* decided by the same

Court on March 23, 1953, the following general description of the purposes of this Law are given :

" The object in punishing a criminal of this class is not to requite his offence and purge his soul . . . just as the purpose of this Law is not that of other criminal Statutes. In the Explanatory Memorandum which accompanied the Bill it was stated that the purpose of the Law is to ' enable justice to be done in Israel to the Nazis, and those who associated and collaborated with them in the murder and extermination of the Jewish people and in their crimes against humanity '. We do not cite this as a basis for our decision on the Law, but merely to explain the background of the enactment. Indeed, this Law is fundamentally different in its characteristics, in the legal and moral principles underlying it and in its spirit, from all other criminal enactments usually found on the Statute books. The Law is retroactive and exterritorial and its object, *inter alia,* is to provide a basis for the punishment of crimes which are not comprised within the criminal law of Israel, being the special consequence of the Nazi régime and its persecutions . . . [from the Explanatory Memorandum]. It is more severe than criminal statutes. It authorizes an Israel court to judge for the second time in Israel a person already tried abroad for the same offence, account however being taken of any sentence served abroad. The rules of prescription have been abolished or modified. The General Amnesty Ordinance, 5709–1949, does not apply. The Court has special power to deviate from the rules of evidence. What is the reason for all this ? Only one answer is possible : the circumstances in which the crimes were committed were extraordinary, and therefore it was only right and proper that this Law, its application, employment, and the purpose which the State had in mind in enacting it—that these too should be extraordinary. . . ."

[Reports : *Piskei-Din*, 7 (1953), p. 296 ; *Pesakim Elyonim*, 12 (1953), p. 336.]

Note.—In the Bill as submitted by the Government to the Knesseth (Parliament), it was proposed to regulate the question of punishment as in the international documents : but in the Knesseth it was decided that the death penalty was the only penalty to be imposed on persons convicted under s. 1 of the Law. None of the acts of the accused in the above cases were, in the light of the general run of " war crimes " subsequently tried in the Allied countries, of any exceptional degree of gravity, and this explains the anxiety of the Courts to avoid reaching extreme conclusions on the Law. See Muflah, " Nazi and Nazi Collaborators (Punishment) Law ", in *Hapraklit*, vol. IX (1952), p. 61, for criticism of the enactment and for an explanation of these judgments. An interesting feature of this Law is that it relates entirely to events which occurred some time before the State of Israel came into existence, but many of the victims of which had since found refuge in Israel.

War—Enforcement of Laws of—Punishment of War Crimes—Whether War Criminals Entitled to Privileges of Prisoners of War—The Law of Luxemburg.

See Case No. 6 (*H. and Others* v. *Public Prosecutor*).

IX.—Prisoners of War

Case No. 170 **War—Prisoners of War—Earnings of—Geneva Convention of 1929.**

State of Belgium *v.* Ramioul.

Belgium, Cour de Cassation. February 16, 1951.

The Facts.—The respondent had injured in a traffic accident a number of German prisoners of war employed in Belgian mines. As a result of their injuries they were unable to work. The Belgian State sued the respondent on the ground that it had, by his action, been deprived of the pay of the prisoners which, under Article 34 of the Geneva Convention of 1929 concerning Prisoners of War, it was entitled to keep in whole or in part, and which was intended to meet the cost of food and lodging of the prisoners. The Court of first instance of Liège held, on January 21, 1949, that the Belgian State had suffered no damage, and that, under Article 28 of the Geneva Convention, it was bound to assume entire responsibility for the maintenance, care, treatment and payment of wages of prisoners of war working for private individuals. This was an appeal against that decision.

Held: that the appeal must be dismissed. The authorization given to the administration of a prisoner of war camp, *i.e.* the State, to keep the pay of prisoners in whole or in part, is dependent on agreements being concluded between the belligerents; and, in the absence of such agreements, where the prisoners work for private individuals—as is the case here—their conditions of work are to be settled in agreement with the military authorities. No such agreements had been concluded, either between Germany and Belgium or between the military authorities and the private employers.

[Report: *Pasicrisie belge* (1951), I, p. 396.]

Prisoners of War—Treatment of—Decrees of Occupying Power Issued in Pursuance of Policy Violating Rules of International Law in the Matter of Treatment of Prisoners of War.

See Case No. 182 (*Aboitiz & Co.* v. *Price*).

XII.—Termination of War

War—Termination of—Cessation of Hostilities—Interpretation of a Contract Between a Government and a Private Party—Whether Presumption in Favour of the Government. **Case No. 171**

Girdler Corp. *v.* Charles Eneu Johnson & Co.

United States, District Court, Eastern District of Pennsylvania.
February 6, 1951.

The Facts.—The plaintiff, in a contract with the United States Government, agreed, in order to aid the war effort, to charge for the use of a patented process at a rate appreciably lower than that which it otherwise would have charged. The contract provided that the low rate of payment should continue only to the end of the " war period ", this period being described as six months after the date of the " cessation of hostilities " between the United States and Germany and Japan. The defendant, a designee of the Government, continued to use the process after the surrender of Germany and Japan. The plaintiff brought an action to recover royalties due at the normal, rather than the war-time, scale, from six months after September 2, 1945, on which day Japan formally surrendered. The defendant contended that the cessation of hostilities did not come until December 31, 1946, when the President of the United States formally proclaimed :

> "... Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.
>
> " Now, therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946."

The defendant further contended that the contract being one in which the public had an interest, it should be construed in the public's favour.

Held: for the plaintiff. The Court said :

" The problem of the meaning of the clause in the present contract and other similar clauses has come before the courts on numerous occasions. The courts have uniformly held that the terms ' cessation of hostilities ', ' termination of the war ', ' duration of the war ', ' engaged in war ' and ' acts of war ' refer to the end of actual hostilities. *Samuels* v. *United Seamen's Service*, 9 Cir., 1948, 165 F. 2d 409 ; *Boston Penny Savings Bank* v. *Stoneholm Co.*, 1949, 323 Mass. 662, 83 N.E. 2d

Case No. 171 Contd. 885 ; *Stinson* v. *New York Life Ins. Co.*, 1948, 83 U.S.App.D.C. 115, 167 F. 2d 233 ; *Darnall* v. *Day*, 1949, 240 Iowa 665, 37 N.W. 2d 277.

" Under these cases, plaintiff might well contend that the cessation of hostilities in World War II came on August 14, 1945, since that is the date when hostilities actually ceased, but it does not press this point.

" Defendant points to the fact that the contract in the present case was executed as an aid to the war effort, and contends that as a contract in which the public was interested it must be construed in a manner different from the construction of an ordinary private contract. It further contends that since the contract involved a matter in which the public was interested the meaning of ' cessation of hostilities ' must be construed in accordance with the public proclamation by the President setting forth when the cessation of hostilities occurred. With this contention I do not agree. In 9 *Williston on Contracts*, Sec. 46, P. 65, it is said : '. . . The words of contracts should be given a reasonable meaning rather than an unreasonable one and a court will endeavor to give a construction most equitable to the parties and which will not give one of them an unfair or unreasonable advantage over the other.

" '. . . The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the Government and individuals. *U.S.* v. [*Utah, Nevada and California*] *Stage Co.*, 199 U.S. 414, [26 S.Ct. 69] 50 L. Ed. 251. A Government contract should be interpreted as are contracts between individuals with a view to ascertaining the intention of the parties and to give it effect accordingly, if it can be done consistently with the terms of the instrument. *Hollenbach* v. *U.S.*, 233 U.S. 165, [34 S.Ct. 553] 58 L. Ed. 898.'

" In *United States* v. *Standard Rice Co.*, 1944, 323 U.S. 106, 111, 65 S.Ct. 145, 147, 89 L. Ed. 104, it was said : '. . . Although there will be exceptions, in general the United States as a contractor must be treated as other contractors under analogous situations. When problems of the interpretation of its contracts arise the law of contracts governs. . . .'

" As the numerous cases construing clauses similar to the clause in the present case point out, the ordinary meaning of the words indicates that the parties intended the end of actual hostilities to control the situation. There is nothing in the words of the present contract to indicate that the parties in this case intended otherwise.

" Accordingly, it is ordered, adjudged and decreed that the cessation of hostilities as provided in the contracts occurred on September 2, 1945, and, therefore, judgment is for the plaintiff. . . ."

[Report : 95 F. Supp. 713.]

NOTE.—On appeal, the Circuit Court of Appeals affirmed the judgment "for the reasons well stated" below (194 F. 2d 533, 92 P.Q. 291, 341 (1952)).

On the meaning of "duration of the war" see also *Progressive Furniture Co.* v. *Stoneville Furniture Co.*, 192 F. 2d 869 (1951), and *Schaffer et Al.* v. *Oldak et Al.*, 12 N. J. Super. 80, 78 A. 2d 842 (1951).

War—Termination of—Distinction between Cessation of Hostilities and Conclusion of Peace—Interpretation of Terms of a Will—Whether Intention of Testatrix or Strict Legal Meaning of the Words to be Given Effect to—The Law of South-West Africa. **Case No. 172**

Ex parte KANNEGIESER, N.O.

South-West Africa, High Court.
(van Blerk A.J.)
August 7, 27, 1951.

THE FACTS.—Mrs. Gathemann died at Windhoek, in South-West Africa, on May 18, 1947. Her will was dated August 21, 1944. In it she provided that her estate should be managed by an administrator until one year after the end of the war between the Allied Powers and Germany. Thereafter it was to be distributed to various relatives of the testatrix. Mrs. Gathemann was herself a British subject, but all those entitled under her will, at the time of its conclusion, were enemy aliens—hence the provision delaying the distribution of the estate until the end of the war. Nevertheless, the Administrator of Enemy Property took over the estate on her death, but later handed it to the administrator Mrs. Gathemann had appointed. This administrator now applied to the Court for an order empowering him to distribute the estate in terms of the will.

Held: that such an order should be granted. Only a state of war or a state of peace was known to the law; but the intention of the testatrix should be given effect to, and she had meant the cessation of hostilities, not the conclusion of a peace treaty. The Judge said:

"By Union Proclamation, 161 of 1951, the state of war between South Africa and the German Reich, dating back to September 6, 1939, was ended, active hostilities having ceased with the surrender of the Reich on June 5, 1945. . . . The Proclamation declares that so far it has been impossible to conclude a peace treaty with Germany, but the Union hereby terminates the formal state of war between the two countries.

"It is said that only a state of peace or a state of war is known to the law. Lord MacNaghten said, in the case of *Janson* v. *Driefontein Consolidated Mines Ltd.* ((1902) L.J. 864): 'I think the learned counsel for the respondent was right in saying that the law recognises a state of peace and a state of war, but that it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace nor war.'

" In the case of *Kotzias* v. *Tyser* [1] ((1920) L.J. 529 at 532), Roche, J., said : ' The authorities show that, in the absence of any specific statutory or contractual provision to the contrary, the general rule of international law is that peace is not concluded until a treaty is finally binding on the belligerents, and that this stage is not reached until ratifications of the treaty have been exchanged between them.' See, also, Oppenheim's *International Law* (6th. ed., vol. II, pp. 473 and 474).

" As in the case of the First World War we have here to deal with a period when there is *de facto* no longer a war, namely the period from the cessation of hostilities until such time as a peace treaty is concluded. I think that, with an eye on the purpose of the testatrix, in other words the possibility that the inheritance of her relations should fall into the hands of the administrator of enemy property, she did not mean ' by the end of the war ' the signing of a peace treaty, but the cessation of hostilities, which took place on June 5, 1945. I agree with the remarks made in *Re Cooper's Estate* ((1946), 1 All E.R. 28 at pp. 30 and 31), where the learned Judge said : '. . . The Court is not bound to give each word its strict legal meaning . . . when a person refers to " the end of the war " he may mean the date on which, in accordance with strict legal principles, the war is brought to an end by ratification of a treaty of peace ; but the ordinary man would, I think, be much more likely to have in mind the effective end of hostilities.'

" It also appears impossible to conclude a peace treaty with Germany as it was, as it no longer so exists to-day. West and East Germany are now split, and the former has its own Government, a fact of which the Court can take judicial notice. It is also doubtful whether the Allied Powers remain the same. Is, for example, the China of to-day the former China ? Furthermore, the reason for tying up the will has disappeared ; the grounds for the fear of the testatrix have fallen away, as the administrator of enemy property gave written permission on April 24, 1951, to the appointee of Mrs. Gathemann to take over full control of the estate.

" Therefore an order will be granted empowering the petitioner to distribute the estate in terms of the will. . . ."

[Report : [1952] (1) S.A. 198 [S.W.A.].]

---

[1] See *Annual Digest*, 1919–1922, Case No. 307.

Termination of War—Meaning of Surrender and its Effect on Belligerent Rights—Capture of Ships—Whether Surrender Equivalent to Armistice—German Unconditional Surrender of 1945—Meaning of Allied Declaration of June 5, 1945—Effect on Belligerent Rights.

See Case No. 222 (*The Hermes and Other Structures*).

War—Termination of—Armistice—Effect of.

See Case No. 193 (*Re Scarpato*).

War—Termination of—Cessation of Hostilities—Effect upon Enemy Government's Right to Sue.

See Case No. 153 (*Japanese Government* v. *Commercial Casualty Insurance Co.*).

B—WARFARE ON LAND

III.—Occupation of Enemy Territory

i.—Nature and Effects of the Occupation

Belligerent Occupation — Status of Occupied Territory — Whether Foreign Territory—Powers of Occupant—Article 43 of Hague Regulations. **Case No. 173**

COBB *v.* UNITED STATES.

United States, Court of Appeals, Ninth Circuit. June 11, 1951.
As Amended on Denial of Rehearing, August 27, 1951.

THE FACTS.—The appellant brought an action, pursuant to the Federal Tort Claims Act, against the United States to recover damages for injuries suffered in an automobile accident in Okinawa. That Act excludes "Any claim arising in a foreign country." (28 U.S.C.A. §§ 2671–2680.) The question was whether, in 1948, Okinawa was a foreign country. At that time Okinawa, a Japanese island, was under military occupation by the forces of the United States of America. No peace treaty had yet been concluded between the United States and Japan.

Held: that since Okinawa was a foreign country, the appeal must be dismissed. The Court said:

"Since its conquest Okinawa has had no independent legislative, executive or judicial government except the United States Military Government, which still controls the island.[1] The United States operates naval, military and air bases on

---

[1] [Footnote omitted.]

Case No. 173 *Contd.*

Okinawa, and a congressional committee has expressed a purpose of the United States to maintain these bases indefinitely.[1] Yet the ultimate fate of the island is not settled.[2] The United States has expressed no intention to annex the island, to return it to Japan, or to establish it as an independent state. The island is not under United Nations trusteeship, or the Far Eastern Commission.[3] No peace treaty has yet been concluded with the former sovereign, Japan.

" On these facts the District Court held that Okinawa was a ' foreign country', relying on three District Court decisions,[4] and on *United States* v. *Spelar*, 1949, 338 U.S. 217, 70 S.Ct. 10, 94 L. Ed. 3. In the *Spelar* case the Supreme Court held that the Tort Claims Act did not grant governmental consent to be sued for a tort which occurred on Newfoundland territory leased by the United States. The court rested this conclusion on two tests applied to the *Spelar* claim : (1) Whether the leased territory was ' territory subject to the sovereignty of another nation ', 338 U.S. 217, 219, 70 S.Ct. 10, 11, and, (2) whether the liability asserted was one ' depending upon the laws of a foreign power ', 338 U.S. at page 221, 70 S.Ct. at page 12. We think it appropriate here to apply these tests to plaintiff's claim. . . .

" In defining the term ' foreign country ', as used in 28 U.S.C.A. § 2680(*k*), the Supreme Court observed : ' We know of no more accurate phrase in common English usage than " foreign country " to denote territory subject to the sovereignty of another nation.' 338 U.S. 217, 219, 70 S.Ct. 10, 11. In support of this definition the Court quoted with approval the statement of the Court in *De Lima* v. *Bidwell*, 1901, 182 U.S. 1, 180, 21 S.Ct. 743, 746, 45 L. Ed. 1041 : ' A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States.'

---

[1] [Footnote omitted.]

[2] A letter to appellant's counsel dated April 12, 1949, from the Acting Legal Adviser of the Department of State, states in part : " No formal determination has been reached concerning the final disposition of Okinawa. No treaty of peace with Japan has yet been concluded, nor has any action been taken to place Okinawa under the International trusteeship system established under the Charter of the United Nations."

[3] The letter cited in note [2] states in addition : " Okinawa is not controlled by the Far Eastern Commission, which was established pursuant to the Agreement of Foreign Ministers at Moscow on December 27, 1945 ; the United States has been in charge of the military occupation of the Ryukyus ".

A letter to appellant's counsel dated April 20, 1949, from the Political Affairs Officer, Trusteeship Division, United Nations, states in part : " I am directed to inform you that the question of placing Okinawa under trusteeship has not been raised in any organ of the United Nations, and, as far as is known, there have been no representations or statements to the United Nations on this question by any representative of the United States ".

[4] *Brewer* v. *United States*, D.C.N.D.Cal. 1948, 79 F. Supp. 405 (Okinawa); *Brunell* v. *United States*, D.C.S.D.N.Y. 1948, 77 F. Supp. 68 (Saipan) ; *Straneri* v. *United States*, D.C.E.D.Pa. 1948, 77 F. Supp. 240 (Belgium). . . .

Since Newfoundland was unquestionably subject exclusively to the 'sovereignty' of Great Britain, the leased territory in Newfoundland was held to be part of a 'foreign country'.

" When applied to Okinawa, however, the test of 'sovereignty' affords no such satisfactory conclusion. At the outset, it must be assumed that 'sovereignty is never held in suspense'.[1] The question, therefore, is whether Japan has lost her sovereignty over Okinawa and, if so, to what power that sovereignty has passed. In the event the United States' occupation of Okinawa were of a clearly provisional character designed simply to maintain order on the island until Okinawa could be returned to a responsible Japanese government, it could be said that Japan did not lose her 'sovereignty' over the island but had been merely deprived temporarily of the power to exercise some of the rights of sovereignty.[2] This theory would be particularly applicable to the Japanese home islands because in those islands a native Japanese government has been permitted to exercise most of the normal powers of government in matters of domestic administration, subject to the supervision of the Supreme Commander. However, the United States has expressed no intention of returning Okinawa to a Japanese government. On the contrary, the announced policy of the State Department is to place the island outside the 'sovereignty' of Japan, and the Supreme Commander has ordered that the Japanese government refrain from attempting to exercise any governmental or administrative authority there. These circumstances divest Japan of all sovereignty over the island.[3]

" Sovereignty, therefore, must have passed to some other people. Had the United States announced the objective of establishing an independent state of Okinawa it could be said that, in a sense, sovereignty passed to the people of Okinawa, the government being administered for the people by the occupant as a sort of trustee.[4] The record indicates, however, that no such policy has been adopted. The ultimate fate of Okinawa has not yet been decided. It cannot be said that the loss of 'sovereignty' over the island by Japan vests the '*de jure* sovereignty', in the traditional sense, in the natives of Okinawa.

" By evicting the Japanese and affirmatively withdrawing

---

[1] *United States* v. *Curtiss-Wright Export Corp.*, 1936, 299 U.S. 304, 317, 57 S.Ct. 216, 219, 81 L. Ed. 255.

[2] See telegram from Secretary Hughes to Ambassador Herrick, dated March 5, 1923, quoted in part in 1 Hackworth, Digest of International Law (1940) p. 146; Cf. *De Lima* v. *Bidwell*, 1901, 182 U.S. 1, 194, 21 S.Ct. 743, 45 L. Ed. 1041, citing *Fleming* v. *Page*, 1850, 9 How. 603, 13 L. Ed. 276; Mr. Justice Hunt, concurring in *City of New Orleans* v. *Steamship Co.*, 1874, 20 Wall. 387, 396, 399, 22 L. Ed. 354.

[3] Cf. *United States* v. *Rice*, 1819, 4 Wheat. 246, 254, 4 L. Ed. 562.

[4] See 1 Hackworth, Digest of International Law, 156–57 (1940); Cf. *Neely* v. *Henkel* (No. 1), 1901, 180 U.S. 109, 21 S.Ct. 302, 45 L. Ed. 448.

Case No. 173 *Contd.*

Okinawa from the sovereignty of Japan, the belligerent occupants acquired the exclusive power to control and govern the island. This power, although perhaps acquired in the name of the Allied Powers, is lodged exclusively in the United States. The United States Military Government now governs, and will continue indefinitely to govern, the island of Okinawa, free from interference by other powers.[1] The will of the United States is in fact the ' supreme will ' [2] on Okinawa. The United States has therefore acquired, and still retains, what may be termed a ' *de facto* sovereignty '.[3]

" However, the traditional ' *de jure* sovereignty ' has not passed to the United States. The conqueror does not acquire the full rights of sovereignty merely by occupying and governing the conquered territory without a formal act of annexation or at least an expression of intention to retain the conquered territory permanently.[4] It does not necessarily follow, therefore, that Okinawa is not a ' foreign country ' within the meaning of the Tort Claims Act. So long as the ultimate disposition of that island remains uncertain, it offers a persuasive illustration of the observation that ' the very concept of " sovereignty " is in a state of more or less solution these days '.[5]

" In short, the traditional test of sovereignty, when applied to the status of Okinawa, admits of no conclusive answer. While the traditional test furnishes a useful tool of construction in the usual case it cannot control the interpretation of § 2680(*k*) in the unusual case. Whether the term ' foreign country ' in the Tort Claims Act includes Okinawa must be decided in the way that accords more clearly with the central purpose of the Act.

---

[1] In addition to the letters cited in [n. 3, p. 550] *supra*, appellant's counsel introduced a letter dated (apparently) May 5, 1949, from the Executive Secretary of the Office of the Secretary of Defense, stating in part : " Whereas Japan is occupied and controlled by the Allies, Okinawa is governed solely by the United States ".

[2] *United States* v. *Curtiss-Wright Export Corp.*, 1936, 299 U.S. 304, 317, 57 S.Ct. 216, 81 L. Ed. 255.

[3] Cf. *Thorington* v. *Smith*, 1868, 8 Wall. 1, 19 L. Ed. 361 ; *Cross* v. *Harrison*, 16 How. 164, 189, 14 L. Ed. 889 ; *Fleming* v. *Page*, 1850, 9 How. 603, 614, 13 L. Ed. 276 ; *United States* v. *Rice*, 1819, 4 Wheat. 246, 254, 4 L. Ed. 562 ; 1 Hackworth, Digest of International Law 128 (1940) ; 1 Moore, International Law Digest 14 ; 1 Foulke, International Law § 57 (1920) ; Colby, Occupation under the Laws of War, 26 Col.L.Rev. 146, 158 (1926).

Since ' de facto sovereignty ', as the term is used here, arises out of the bare power of the occupying authority, the possible interest of the other Allied Powers in the government of Okinawa does not affect this conclusion.

[4] See 1 Hyde, International Law § 106 (1922) ; 2 *id.* §907 ; 1 Hackworth, Digest of International Law 427 (1940) ; Rules of Land Warfare 273, 275, Basic Field Manual (FM 27–10, 1940) 73–74, quoted in part in 6 Hackworth, Digest of International Law, pp. 385 and 389 (1943). Cf. 2 Garner, International Law and the World War 77 (1920) ; *Ochoa* v. *Hernández*, 1913, 230 U.S. 139, 154, 33 S.Ct. 1033, 57 L. Ed. 1427. But, cf. *United States* v. *Rice*, 1819, 4 Wheat. 246, 254, 4 L. Ed. 562.

[5] Mr. Justice Frankfurter, concurring in *United States* v. *Spelar*, 1949, 338 U.S. 217, 222, 224, 70 S.Ct. 10, 13, 94 L. Ed. 3. See 1 Foulke, International Law 69, n. 11 (1920) ; 1 Oppenheim, International Law 101–08 (1905) ; 1 Hackworth, Digest of International Law § 11 (1940) ; Aufricht, On Relative Sovereignty, 30 Cornell L.Q. 137 (1944) ; Colby, *op. cit. supra*, note 3, p. 155.

" The Federal Tort Claims Act was the product of an effort to reform the cumbersome private bill procedure which has encumbered congressional activities in the past. Despite the desirability of relieving Congress as far as possible of the responsibility for compensating private persons for damages caused by governmental activities, wherever the damages might occur, Congress explicitly excluded from the coverage of the Act claims ' arising in a foreign country '. The Supreme Court, after studying the congressional hearings and reports, has concluded that the purpose of this exception was to avoid subjecting ' the United States to liabilities depending upon the laws of a foreign power '.[1] Since liability under the Act is to be determined under the law of the place where the tort occurs, 28 U.S.C.A. § 1346(b), the exception of § 2680(*k*) was phrased in terms of the place where the claim arises. To decide whether Okinawa is a ' foreign country ', as the term is used in the statute, it is necessary to determine whether the law of Okinawa, which controls this claim, is the law ' of a foreign power '.

" Prior to World War II, the law of Okinawa was Japanese law, administered and promulgated by the Japanese sovereign. Regardless of invasion, occupation,[2] or cession,[3] that law continues in force until it is changed.[4] The parties have failed to show any change and it must be presumed that the original Japanese law is still in effect.

" However, Okinawa law is not the law ' of a foreign power ' in the sense that Newfoundland law is the law of another nation. The law of Okinawa cannot now be modified in any way by any government but the United States.[5] By the law

---

[1] *United States* v. *Spelar*, 1949, 338 U.S. 217, 221, 70 S.Ct. 10, 12, 94 L. Ed. 3.

In an article entitled Suits on Tort Claims against the United States, 1948, 7 F.R.D. 689, 695, Judge Hulen, without citing authority, has suggested that this exception was provided " probably because of the difficulty of obtaining evidence and necessity of providing rules of law to govern such liability ". These points, if they were to be given weight despite the *Spelar* opinion, would not be very helpful in deciding whether Okinawa should be treated like Guam or like leased property in Newfoundland, at least if the burden of proving the applicable law falls on the plaintiff. See *United States* v. *Spelar*, 1949, 338 U.S. 217, 218, note 3, 70 S.Ct. 10.

[2] Cf. *Philippine Sugar Estates Development Co.* v. *United States*, 1904, 39 Ct. Cl. 225, 247, quoted in part in 1 Hackworth, Digest of International Law (1940), p. 156; Colby, *op. cit. supra*, p. 151.

[3] *Panama Railroad Co.* v. *Bosse*, 1919, 249 U.S. 41, 44, 39 S.Ct. 211, 63 L. Ed. 466; *American Insurance Co.* v. *Canter*, 1828, 1 Pet. 511, 542, 7 L. Ed. 242.

[4] *Vilas* v. *Manila*, 1911, 220 U.S. 345, 357, 31 S.Ct. 416, 55 L. Ed. 491; *Ortega* v. *Lara*, 1906, 202 U.S. 339, 342, 26 S.Ct. 707, 50 L. Ed. 1055; *Mitchel* v. *United States*, 1835, 9 Pet. 711, 734, 9 L. Ed. 283; 1 Hyde, International Law § 122 (1922); 1 Hackworth, Digest of International Law, § 79 (1940).

[5] See *United States* v. *Rice*, 1819, 4 Wheat. 246, 254, 4 L. Ed. 562; *City of New Orleans* v. *Steamship Co.*, 1874, 20 Wall. 387, 393–394, 22 L. Ed. 354; Mr. Justice Hunt, concurring, 20 Wall. at page 397, quoting Halleck on

Case No. 173 *Contd.* of nations, it may be said that the United States has the right—and certainly the United States has the power—to abrogate all the existing tort law of Okinawa and substitute an entirely new tort law.[1] Indeed, the argument might be advanced that the law of Okinawa at the time of conquest owes its continued existence to the will of the United States, which has impliedly adopted that law.[2] In this view the law of Okinawa is not the law 'of a foreign power', but the law of the United States; the congressional objection to subjecting the United States to unforseeable liability based on the laws of other sovereigns, over which the United States has no control, would be inapplicable.

"The power of the belligerent occupant is not relevant in this proceeding, however, if the rights and duties are clear. Assuming that the United States once had an unlimited right to revise the tort law of occupied countries, that right was abandoned with the Hague Convention of 1907, to which the United States was a signatory. Article 43, as translated in the United States statutes-at-large, provides:

"'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'[3]

"In signing this treaty the United States has undertaken a duty, in cases to which the Hague Convention is applicable,

---

International Law; 2 Hyde, International Law § 690 (1922); Cf. 6 Hackworth, Digest of International Law, 398 (1943).

[1] *Dooley* v. *United States*, 1901, 182 U.S. 222, 230–231, 21 S.Ct. 762, 45 L. Ed. 1074, quoting Halleck on International Law; General Order No. 101, War Department, Adjutant General's Office, July 18, 1898, quoted in *Ochoa* v. *Hernández*, 1913, 230 U.S. 139, 155, note 1, 33 S.Ct. 1033, 57 L. Ed. 1427. Cf. 26 Ops. Att'y Gen. 113, 118 (1907); Opinion of Legal Adviser of Department of State, May 7, 1936, quoted in part in 1 Hackworth, Digest of International Law (1940), p. 156; Colby, Occupation under the Laws of War, 25 Col.L. Rev. 904, 916 (1925).

[2] Cf. 26 Ops. Att'y Gen. 113, 118 (1907); *Shapleigh* v. *Mier*, 5 Cir., 1936, 83 F. 2d 673, 676; *Cross* v. *Harrison*, 16 How. 164, 193, 14 L. Ed. 889;

Apparently a military proclamation formally adopted the existing civil law of Germany, except as modified by the occupation authorities. Fahy, Legal Problems of German Occupation, 47 Mich. L.Rev. 11, 14, citing U.S.M.G. Proclamation 2, Sept. 19, 1945, Military Gazette, Issue A, p. 2 (1946). The parties to this case have not referred to any comparable proclamation concerning Okinawa.

[3] 36 Stat. 2277, 2306; 2 Malloy, Treaties 1910, 2269, 2288. The French text, described by Schwenk as "authoritative", is: "L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu les lois en vigueur dans le pays". The words "public order and safety", in the "semi-official" translation, have always been inaccurate, for the French appears to contemplate restoring all the aspects of the daily civil life of the occupied country, including presumably the duties imposed by the local law of torts. See Schwenk, Legislative Power of the Military Occupant under Article 43, Hague Regulations, 54 Yale L.J. 393, n. 1.

to maintain the tort law of the occupied country.[1] It appears to be generally conceded that this Article was originally applicable to the occupation of Okinawa by the United States.[2] Despite the fact that hostilities have long since ceased, that occupation cannot be regarded as anything but a ' belligerent occupation ', within the scope of Article 43, until the terms of peace have been finally settled by treaty, proclamation, or otherwise.[3]

" But if we assume, as has been ably argued, that Article 43 did not in terms restrict the legislative authority of the United States Military Government in Okinawa in 1948, that article merely expresses ' the modern usage of nations, which has become law . . . that sense of justice and of right which is acknowledged and felt by the whole civilized world '.[4] At least until the occupant has determined upon the ultimate disposition of the occupied territory, the occupant has the right to legislate only in the interest of the safety of the occupying power or in the interest of the welfare of the inhabitants of the occupied territory ; the occupant lacks authority to legislate at will, in disregard of the spirit and traditions of the occupied territory. For example, suppose that the pre-war tort law of Okinawa was based on a doctrine of ' strict ' liability without fault, and that the United States Military Government, fearing excessive liability under the Federal Tort Claims Act, attempted to abrogate that principle and substitute a doctrine of liability based on fault. Such a change, in disregard of the legitimate

---

[1] See Schwenk, *op. cit. supra* [p. 554, n. 3], pp. 399–402 ; 2 Hyde, International Law § 690 (1922) ; 2 Oppenheim, International Law § 169 (1906) ; 6 Hackworth, Digest of International Law § 587 (1943) ; 2 Garner, International Law and the World War 77, 85, (1920) ; Colby, Occupation under the Laws of War, 26 Col.L.Rev. 146, 151 (1926).

Cf. Rules of Land Warfare 285–88, Basic Field Manual (FM 27–10, 1940), discussed in the foregoing treatises.

[2] Schwenk, writing in 1945, seems to assume that Article 43 applies generally to belligerent occupations arising out of military operations in World War II. See 54 Yale L.J., pp. 407–08. Both Fahy and Rheinstein appear to assume that Article 43 governed the United States occupation of Germany at least until the unconditional surrender of the German forces. Fahy, Legal Problems of German Occupation, 47 Mich.L.Rev. 11 ; Rheinstein, The Legal Status of Occupied Germany, 47 Mich.L.Rev. 23, 27 (1948).

[3] *American Insurance Co.* v. *Canter*, 1828, 1 Pet. 511, 542, 7 L. Ed. 242 ; Rheinstein, The Legal Status of Occupied Germany, 47 Mich.L.Rev. 23, 27 (1948) ; Colby, Occupation Under the Laws of War, 25 Col.L.Rev. 904, 905, 910 *et seq.* ; 2 Hyde, International Law § 689 (1922), relying upon Rule 294 of the Rules of Land Warfare ; Cf. *id.* at § 904 *et seq.* ; 2 Oppenheim, International Law § 231 (1906) ; 6 Hackworth, Digest of International Law § 590 (1943).

Contra : Fahy, Legal Problems of German Occupation, 47 Mich.L.Rev. 11, 13 (1948).

See *United States* v. *Huckabee*, 1872, 16 Wall. 414, 434–435, 21 L. Ed. 457.

[4] *United States* v. *Percheman*, 1833, 7 Pet. 51, 86–87, 8 L. Ed. 604. Cf. Opinion dated March 17, 1947, printed in 7 Selected Opinions of the Office of Military Government for Germany (U.S.) 115, 122 ; Stein, Application of the Law of the Absent Sovereign in Territory under Belligerent Occupation : The Schio Massacre, 1948, 46 Mich.L.Rev. 341 ; Rheinstein, *loc. cit. supra*, [n. 2].

Case No. 173 *Contd.* interests of the inhabitants, would violate the ' dictates of the public conscience ', [1] as well as the spirit, if not the letter, of Article 43.

" It follows that the United States Military Government was not free to alter the tort law of Okinawa at will, but was bound to maintain the pre-existing ' foreign ' law. Since Congress was unwilling to subject the United States to liability based on that sort of law, the action was properly dismissed."

The Court denied a petition for rehearing. In this connection, Circuit Judge Pope declared :

" I concur in the action of the Court in denying the petition for rehearing. The petition for rehearing calls to our attention the necessity of a re-examination of our former conclusion as to the applicability of Article 43 of the Hague Convention of 1907 upon which our decision of June 11, 1951, was predicated. The sources of information mentioned in the petition would indicate that in the Ryukyu Islands, as well as in Germany and in Japan, the United States Military Government, with the approval of the State Department, has promulgated regulations relating to traffic and operation of motor and other vehicles. Thus, departments of the Government, whose judgment we are not authorized to review, have taken a position with respect to Article 43 contrary to that suggested in our first opinion.

" The majority of the Court have now proposed to amend the opinion to eliminate the reliance upon Article 43 and to substitute other language, and upon this amendment of the opinion to deny the petition for rehearing. I cannot bring myself to believe that the opinion in the amended form establishes a sound reason for the conclusion reached.

" The case presents, I think, much more difficulty than did *United States* v. *Spelar*, 338 U.S. 217, 70 S.Ct. 10, 11, 94 L. Ed. 3. There the court was able to say : ' Sufficient basis for our conclusion lies in the express words of the statute'. The court proceeded to conclude that the accident on the Newfoundland airfield was one ' arising in a foreign country ', because the territory there was clearly subject to the sovereignty of another nation.

" It was pointed out in our original opinion that as concerns Okinawa, this ' test of sovereignty ' furnishes no solution here. The court therefore proceeded to consider some of the other things said in the *Spelar* case where the court, after consideration of some of the legislative history of the Federal Tort Claims Act, came to the conclusion that the exception here applied was inserted in order to avoid subjecting ' the United States to liabilities dependent upon the laws of a foreign power '. The court then proceeded to test the application of the Tort Claims Act by this summarization of the Congressional motive which the Supreme Court evolved from the legislative history.

---

[1] Foreseeing the possibility that the Hague Regulations might be narrowly construed in particular cases, the contracting parties provided in the preamble to the Regulations : " Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the *inhabitants* and the belligerents *remain under the protection* and the rule of the principles *of the law of nations* as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." 36 Stat. 2279–80, 2 Malloy, Treaties 1910, p. 2272. [Emphasis added].

" I feel that the application of this test has led the court into unnecessary difficulties. What we are doing is not applying a precise language of the Act, but rather a summarization of the legislative history. I have in mind all that Mr. Justice Jackson said in his concurring opinion in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 1951, 341 U.S. 384, 71 S.Ct. 745, 751, that ' Resort to legislative history is only justified where the face of the Act is inescapably ambiguous. . . .'

" I am of the opinion that the conclusion at which we have arrived is the only possible one here for the simple reason that I think it is impossible to conclude that Okinawa was anything other than a ' foreign country ' within the meaning of the exception here involved. Plainly, the term ' foreign country ' is not self-defining, and it is not as definite as a description of weights and measures. It does not mean the same thing today that it meant in generations past, but I think that any person charged with the specific question here involved cannot arrive at any conclusion other than that Okinawa must be held to be within the meaning of the words ' foreign country ' as used in the Tort Claims Act.

" In arriving at that conclusion, it is not easy to call to mind any pat test. It seems to me that arriving at this conclusion is merely a matter of common sense. I am impressed by what Judge Yankwich said in *Hichino Uyeno* v. *Acheson*, D.C., 96 F. Supp. 510, 515, as follows : '. . . it is obvious that the words " foreign state " are not words of art. In using them, the Congress did not have in mind the fine distinctions as to sovereignty of occupied and unoccupied countries which authorities on international law may have formulated. They used the word in the sense of " otherness ". When the Congress speaks of " foreign state ", it means a country which is not the United States or its possession or colony,—an alien country,—other than our own, bearing in mind that the average American, when he speaks of a " foreigner " means an alien, non-American. . . . So here, the interpretation called for is that of common speech and not that derived from abstract speculation on sovereignty as affected by foreign military occupation.'

" Since I assume that Congress was using the words here involved as those ' of common speech ', and that so considered the Island of Okinawa would come within them, I think that

Case No. 173 *Contd.* this action cannot be maintained for the simple reason that it is excluded by the express terms of the Act."

[Reports: 191 F. 2d 604; *certiorari* denied, 342 U.S. 913, 72 S.Ct. 360, 96 L. Ed. 683 (1952).]

NOTE.—For an examination of this and similar cases see Green, " Applicability of American Laws to Overseas Areas Controlled by the United States ", in *Harvard Law Review*, 68 (1955), p. 781.

Case No. 174 **Belligerent Occupation—Nature of—Sovereignty Over Occupied Territory—Power of an Absent Sovereign—Decree of Government-in-Exile Effectively Transferring Title to Assets Situated in Enemy-Occupied Territory—Confiscation of Private Property by Belligerent Occupant—Recognition of—Validity of Acts of Foreign Governments Affecting Property Within their Territorial Jurisdictions—*Situs* of Debt—Whether Inseparable from the *Situs* of Certificates—Effect of Legislation of Government-in-Exile which Interferes with Occupant's Legitimate Rule—Whether Legitimate Sovereign Entitled to Enact Legislation over Occupied Territory which does not Conflict with the Legitimate Rule of the Belligerent Occupant—Effect of Articles 43 and 46 of the Hague Regulations.**

STATE OF THE NETHERLANDS *v.* FEDERAL RESERVE BANK.

United States, District Court, Southern District, New York.
May 14, 1951.

Court of Appeals, Second Circuit. January 21, 1953.

THE FACTS.—The State of the Netherlands, relying upon the Decree described below, brought action against the Federal Reserve Bank of New York for the possession of four bearer bonds of American corporations held in a blocked account. The defendant, claiming no title in the bonds, interpleaded one Verdun J. Archimedes, who asserted title. At the time when the Netherlands were occupied by Germany in 1940, the bonds were owned by four Dutch nationals of the Jewish faith who were domiciled in the Netherlands. The Dutch Government-in-Exile, which had been recognized by the United States as the Government of the Kingdom of the Netherlands, issued a Decree, on May 24, 1940, which purported to vest protective title in the plaintiff to all securities belonging to persons domiciled in the Kingdom of the Netherlands for the purpose of conserving the rights of the former owners. Pursuant to a German Ordinance which compelled Jewish residents to deposit all negotiable assets with the Occupying Power, the bonds came into the hands of a German agency called LIRO, and, in 1943, were sold on the Paris black market by an agent of the German Government. They were subsequently acquired by a Swiss firm, which sold them at a discount to the interpleaded defendant (Archimedes) in 1946. Archimedes was indicted by the United States Government for violating federal foreign funds regulations in connection with this and other transactions, and was required to deposit the bonds with the Federal Reserve Bank.

Held (by the District Court): that Archimedes lacked title, having acquired the bonds by a transaction prohibited by law, and not being a holder in due course; that the Netherlands lacked title, for the reasons set forth below; and that the bonds must remain in the Bank's custody to await the appearance of proper claimants (presumably, the original owners or their heirs), or other appropriate disposition. The Court said:

". . . (f)rom the standpoint of international law theory, The Netherlands Government-in-exile had the status to legislate in connection with assets of its nationals situated in foreign countries whether or not such countries chose to apply the law within their respective jurisdiction. Military occupation by a belligerent enemy does not transfer sovereignty over the occupied territory to that enemy, but confers only quite limited authority to regulate the area. Oppenheimer, Governments and Authorities in Exile, 36 Am.J. of International Law 568, 571 (1942); VI Hackworth, Digest of International Law, p. 385, 391 *et seq.* (1943); Article 43, annex to the Fourth Hague Convention, 1907, 36 Stat. 2277, 2306.

" The absent sovereign remains the *de jure* government of the country. Recognition as such by the United States and other nations served only to confirm this principle. [Oppenheimer, *supra*, p. 571; 6 Modern Law Review 208 (1943)], but did not necessarily commit them to the acceptance of acts that would not be in accord with the authority of an absent sovereign. Thus, the mere fact that our government recognized The Netherlands Government-in-exile would not confer upon The Netherlands Government-in-exile jurisdiction which did not exist.

" In legislating upon the subject of assets of Netherlands domiciliaries located outside the occupied territory, the government-in-exile was performing functions consistent with its then status. As the sovereign, it could endeavor to preserve the interest of its nationals in properties situated beyond enemy control, especially when those residing within the occupied territory might find themselves powerless to protect those interests. In addition, as a belligerent antagonist it endeavored to keep properties which were beyond the territorial reach of the occupying power from, in some way, being applied for the enemy's benefit.

" However, it does not follow that the same criteria apply when the legislation concerns assets within the confines of the occupied territory. Though remaining the sovereign, the absent

Case No. 174 *Contd.* government may, nevertheless, be limited in its further authority to govern the subjugated areas. Cf. 3 Hyde, International Law Chiefly as Interpreted and Applied by the United States, p. 1886 [2nd Rev. Ed., 1945].

" There is only meagre authority and commentary upon the power of the absent sovereign. In general, the view most prevalent prior to World War II, and influenced by decisions and practices stemming from World War I occurrences, considered the acts of the *de jure* governments as having, of themselves, no force and effect in occupied territory. *Occupation of Cavalla* case, 1929–30 Ann.Digest No. 292, p. 496 [Greece, Court of Thrace, 1930]. The available evidence indicates that this doctrine was a part of Anglo-American and German jurisprudence. Stein, Law of Belligerent Occupation, 46 Mich.Law Rev. 341, 351–58 (1948).

" The Belgian authorities have diverged somewhat from this theory asserting that the absent sovereign retained his legislative powers over the occupied territory. But the doctrine was largely an outgrowth of decisions of Belgian tribunals passing upon the effect of decrees of the absent Belgian sovereign after Belgian territory was restored at the conclusion of World War I. Stein, *supra,* pp. 358–69 ; Feilchenfeld, the International Economic Law of Belligerent Occupation, pp. 136–39 (1942). But see, VI Hackworth's Digest, p. 398. Even the Belgian theory recognized that hostile measures, aimed at combatting the occupant and hampering his rule, were not applicable in those regions occupied by the enemy. *De Nimal* v. *De Nimal, Ann.Dig.* 1919–1922, No. 311, p. 447 ; Stein, *supra,* p. 360. Apparently, The Netherlands jurisprudence accepted at least this much, and may even have embraced the Anglo-American view. Feilchenfeld, *supra,* p. 141.

" The decree in question was not a neutral edict. If effective as designed, it would have seriously impaired the negotiability of the bonds in question as well as all other transferable claims. It would have disturbed the commercial life of the occupied community, and cast uncertainty upon numerous business and security transactions. Its aim was avowedly partisan—to hinder the use of the assets of Netherlands domiciliaries by the enemy, and it did not specify or distinguish between assets secured by the enemy through legitimate or illegitimate means. Being an instrument of economic warfare, it would not be, and was not, implemented by the occupying authority so as to affect assets within its territorial control.

" An examination of the development of the American attitude towards belligerent occupations discloses that it was at least originally considered that conquest suspended the sovereignty of the former possessor in favor of the enemy occupant. *United States* v. *Rice,* 1819, 4 Wheat. 246, 254, 4 L. Ed. 562 ; *cf. Thirty Hogsheads of Sugar* v. *Boyle,* 1815, 9 Cranch 191, 3 L. Ed. 701. The *Rice* case has special weight inasmuch as it was United States territory that had been seized, and the Supreme Court held that this country's tariff laws did not apply therein. In *Coleman* v. *State of Tennessee*, 1879, 97 U.S. 509, 517, 24 L. Ed. 1118, the court recognized that under military occupation ' the political relations between the people of the hostile country and their former government or sovereign are for the time severed'. However, ' the municipal laws . . . remain in force, so far as they affect the inhabitants of the country among themselves, unless suspended or superseded by the conqueror '.

" Since ratification of the Hague Regulations respecting land warfare, it is no longer understood that military occupation effects a transfer of sovereignty. 36 Stat. 2277, *et seq.* ; See, especially Article 43, annex to Fourth Hague Convention, 36 Stat. 2306 ; VI Hackworth's Digest 385, 386.

" Nevertheless, the United States broadly construes its powers to legislate for enemy areas it has occupied. VI Hackworth's *Digest* 391. So far as I have been able to discover, throughout World War II the United States has adhered to its position that, as a matter of law, the decrees of an absent sovereign, even a friendly one, were a nullity in the areas occupied by the United States except to the extent that the United States chose to implement them. Stein, *supra*, p. 351, n. 22, 352, 365–370.

" Irrespective of the particular theory adopted, it must be acknowledged that under concepts prevailing at the time Royal Decree A–1 was promulgated, the enactment would not be considered applicable in the occupied areas as a matter of international law or pursuant to relevant conflict of laws principles. Feilchenfeld, *supra*, p. 142–3. Thus, it was not effective to transfer title to assets in territory under enemy military occupation at the time the decree purported to do so.

" Only one reason would justify a departure from these principles ; that is, if modern concepts which condemn the waging of aggressive war, as expressed in and after World War II, necessitate an abandonment of prior theories with respect to the authority of sovereigns absent from their homeland by virtue of military occupation. Thus, if guided by partisan intent, the occupation itself need not be recognized by those in sympathy with the exiled government, and all manner of rules and theories may be disregarded to the end that aid is extended to the conquered and the conqueror opposed.

" It may be that had this case arisen for decision while the United States was at war, some might have felt less compulsion to examine so closely the effect of the action of The Netherlands government. But, today, farther removed from the influence of these former political events and emotions, it is only just that principle be not subordinated to expediency in so far as conflict

Case No. 174 *Contd.* with current international commitments is not occasioned thereby. Cf. *Bank of China* v. *Wells Fargo Bank & U. T. Co.*, D.C.N.D.Cal., 1950, 92 F. Supp. 920.

" Moreover, in the light of the prime place that comity and reciprocity have in international law, other nations are apt to treat us no differently, and certainly no more favorably, than we treat them. In determining the problem now presented, it is quite relevant to bear in mind that the policy of the United States, as previously stated, is not to treat absent sovereigns as having authority to legislate for areas under our occupation. If other nations are to respect this principle when considering situations in which we claim it applies, there is some responsibility upon us to uphold and apply it when evaluating similar circumstances involving others.

" It can be argued that not to give complete effect to Royal Decree A–1 results in a failure to discourage adequately the abhorrent ' looting ' of private property practiced by the Nazis in the occupied countries. Actually, the issuance of the order neither halted the Germans from taking the action they did, nor from realizing, at least in part, on the assets seized. The illegality of the confiscation of private property had previously been declared in the Hague Regulations [Article 46, annex to the Fourth Hague Convention, 1907, 36 Stat. 2277, 2306, 2307]. Those knowingly dealing in such property took the risk of the defective titles they obtained. So long as it be granted that the rightful owners are entitled to the restoration of the bonds, and we recognize the existence of legitimate methods for accomplishing this, it is unnecessary to sanction a means having only dubious justification in law.

" In addition to what has been previously referred to, the essential operation and impact of The Netherlands decree presents further grounds for pause. Even in the *Anderson* case, where effect was given to the decree, the claimant of the funds was a non-resident alien. There is evidence which suggests that, had the rights been asserted by resident creditors or distributees, the presence of conflicting principles might have lessened the chances of this result. See *In re Kahn's Estates*, Sur.Ct., 1942, 179 Misc. 939, 38 N.Y.S. 2d 839, 842.

" To permit The Netherlands government, by virtue of this decree, to marshal, for eventual return to the proper claimants, assets once held by its domiciliaries may, in fact, serve to hinder or delay satisfaction to many having lawful interests in the property. I do not mean to imply in the least that the efforts of the State of The Netherlands are actuated by any but a most worthy purpose. Nevertheless, the title it asserts is not that of, or derivatively through, the real and present owners to whom the property would be restored, but rather that of or through the holders at the time the decree purported to take title. Yet, those persons who once possessed the properties may not, either because of death or otherwise, be the ones entitled at this time. Thus, because such circumstances are not relevant in establishing The Netherlands' title under the decree, if the plaintiff were to prevail, it would tend to preclude our courts from an inquiry into the identities, whereabouts, and rights of present interested persons except the rights of those holders forced to yield up the assets. If this be so, it may lead to the relinquishment of properties, now in this country, without knowledge, or an opportunity to contest, on the part of ultimate American claimants, including heirs of deceased former owners, and domestic creditors of foreign claimants, if such there be.

" I have little doubt that the restoration of confiscated properties can be accomplished, and with the active assistance of the State of The Netherlands, in a manner that will afford our and other courts an opportunity fully to hear and determine all claims to these and other securities which, after proper notice, may be presented for adjudication. Though the perceptible defects in the present method perhaps would not, of themselves, justify its rejection, they hardly encourage an authorization of the program where its adoption means accepting a rule contrary to recognized international law theories of belligerent occupations, and contrary to the conceptions and practices of United States executive authority in the matter of its own military occupations. I am of the opinion, for the reasons discussed above, that Royal Decree A–1 did not effect a transfer of title to the bonds in question upon which the State of The Netherlands may base its claim to the bonds in question.

" In reaching this decision, there is one point that deserves brief mention. The rule has been consistently followed that our courts do not question the validity of the acts of foreign governments that affect property within the territorial jurisdictions of those governments. *Ricaud* v. *American Metal Co.*, 1918, 246 U.S. 304, 38 S.Ct. 312, 62 L. Ed. 733 ; *Oetjen* v. *Central Leather Co.*, 1918, 246 U.S. 297, 38 S.Ct. 309, 62 L. Ed. 726 ; *Bernstein* v. *Van Heyghen Frères Société Anonyme*, 2 Cir., 1947, 163 F. 2d 246, *certiorari* denied 1947, 332 U.S. 772, 68 S.Ct. 88, 92 L. Ed. 357.

" This principle, as I understand it, must apply only in so far as it is conceded that the foreign government acted within its territorial jurisdiction. However, the foregoing discussion demonstrates that the absent sovereign lacked the authority to legislate, effectively, for the occupied areas in the manner it attempted. For this reason, the above-mentioned rule is not deemed apposite to the case at bar.

" It is also of note that at the time Royal Decree A–1 may be said to have become effective in the occupied territory ; that is, when the once-ousted government returned subsequent to

Case No. 174 *Contd.*

the termination of the occupation, the bonds in question were then situated outside The Netherlands in the hands of unknown holders. Thus, again, the decree did not affect property within the government's territorial jurisdiction. Moreover, The Netherlands is not asserting title derived or taken from claimants of these bonds as of this later date when the occupied lands were restored and legislative jurisdiction for the area recommenced, but instead, title derived from those who were owners at the time the decree was promulgated just after the enemy's occupation had begun. . . .

" It has been found previously that title to these securities reposed in four nationals of The Netherlands when the Germans occupied The Netherlands. Under the law of any of three jurisdictions that might possibly be said to govern this phase of the case [*i.e.*, New York, The Netherlands, or Switzerland], LIRO did not acquire title when it obtained the bonds. Indeed, even if one of the foreign jurisdictions would recognize valid title in LIRO, such recognition would not be in accord with the public policy of New York State and the United States, and could hardly be acceptable to this court.

" Plainly, under the rules governing land warfare of the Hague Convention, the confiscation of private property by a belligerent occupant is expressly prohibited. Articles 46, 53, annex to the Fourth Hague Convention, 1907, 36 Stat. 2277, 2306–7, 2308. Moreover, the New York Negotiable Instruments Law contains a provision, as follows :

" ' § 94. When title defective

" ' The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to fraud.'

" It is conceivable that under the doctrine of *Bernstein* v. *Van Heyghen Frères Société Anonyme*, *supra*, this court should accept without question the validity of these official acts of the Nazis. However, the *Van Heyghen* case, which has not been spared unfavorable comment [see, *e.g.*, 57 Yale Law Journal 108 ; 47 Columbia Law Rev. 1061], considered only the public acts of officials committed within the territorial boundaries of the state they served. The ' acts of state ' doctrine has never been applied to official conduct of an enemy nation in territory beyond its boundaries under its temporary wartime military occupation. Furthermore, our executive department has expressly reserved the right of the United States to declare invalid the forced transfers of property decreed by Nazi officers for the occupied countries. Declaration of January 5, 1943. [Department of State Bulletin, Vol. VIII, No. 185, p. 21.]

" The fact that these edicts are so contrary to our public policy weighs heavily against extending the *Van Heyghen* doctrine. . . . Inasmuch as these German ukases had their application outside the boundaries of Germany in areas controlled under a military occupation subsequently terminated by Allied victory over Germany, this court is not inhibited from inquiring into their validity and determining their consequences upon the property at which they aimed. Consequently I am persuaded that title to the bonds remained in the parties from whom the securities were looted—defeasible, however, by a subsequent acquisition by a holder in due course."

The State of the Netherlands and the interpleaded defendant appealed.

Held (by the Court of Appeals) : that the judgment must be affirmed as to Archimedes and reversed as to the State of the Netherlands. The Court said :

" The broad question of the effect of decrees of governments-in-exile seems only just beginning to acquire deep significance in our law. There is a single American precedent, upholding this decree with respect to property located in New York at the time of its enactment and holding invalid a subsequent levy of attachment on the property in a suit against the original owners. *Anderson* v. *N.V. Transandine Handelmaatschappij*, 289 N.Y. 9, 43 N.E. 2d 502. The English courts appear to have expressed somewhat diverse views as to property located in England. Thus a similar Norwegian decree was upheld in *Lorentzen* v. *Lydden & Co.*, [1942] 2 K.B. 202, while this very decree was not enforced in *Bank voor Handel en Scheepvaart* v. *Slatford*, [1951] 2 All E.R. 779 (K.B.) [see *supra*, Case No. 40]. Compare critical comment on this latter case and the decision below in 65 Harv. L. Rev. 1463.

" The *Anderson* case was relied on in the original decision herein sustaining the validity of the complaint, D.C.S.D.N.Y., 79 F. Supp. 966, although it was held inapplicable by Judge Goddard in his decision, D.C.S.D.N.Y., 99 F. Supp. 655. It has been extensively discussed by the parties before us and deserves careful consideration. The court there said, 289 N.Y. at page 19, 43 N.E. 2d 502, 506 :

> ' There can be no doubt that the decree of May 24, 1940, promulgated by the recognized government of the State of the Netherlands is part of the law of a friendly sovereign State of which the defendants are subjects and in which the defendants are domiciled, and that under such law title to the property described in the decree belonging to the nationals and residents of the State of the Netherlands (including the property upon which the sheriff has attempted to levy) is vested in the State of the Netherlands. By comity of nations, rights based upon the law of a foreign State to intangible property, which has a situs in this State,

Case No. 174 *Contd.*

are recognized and enforced by the courts of this State, unless such enforcement would offend the public policy of this State.'

The court then proceeded to find that the Netherlands decree was not confiscatory and did not violate the public policy of New York State or that of the United States as formulated by the State Department for the court's benefit.

" We deem the *Anderson* holding an accurate statement of the law we should apply in the present case. It was thoroughly in accord with the international policy of our government ; and, although the contrary was vigorously urged, it appears to us still a correct exposition of our policy. Thus press releases issued by the United States Department of State on January 19, 1951, and by the Department of Justice on the same day and as recently as October 4, 1951, all recognize the right of the Netherlands Government to claim looted securities held in the United States.

" The ground upon which the district court held the *Anderson* rule inapplicable was that it concerned securities held in the United States, while the bonds here involved were held in the Netherlands at the time Decree A–1 was enacted. But this fact is not of decisive significance. The physical location of bonds does not determine their situs for all purposes. In *Cities Service Co.* v. *McGrath*, 342 U.S. 330, 72 S.Ct. 334, 336, affirming *McGrath* v. *Cities Service Co.*, 2 Cir., 189 F. 2d 744, decided after the decision below, the Supreme Court held that debts evidenced by bearer bonds of United States corporations were located ' within the United States ', thus permitting them to be vested under the Trading with the Enemy Act, despite the fact that the certificates were outside the United States. Determining the situs of the debt by the residence of the debtor, rather than the location of the bonds, seems to us quite as appropriate for that aspect of the wartime foreign assets problem which is involved here. The Supreme Court in the *Cities Service* case pointed out in words prophetically applicable here that employment there of the ' fiction ' that a bond has no existence apart from its certificate would ' defeat the recovery of American securities looted by conquering forces '. 342 U.S. at page 333, 72 S.Ct. at page 336. Of course we would endeavor to protect the rights of the original Dutch owners or their legitimate assignees to ultimate possession of their Nazi-confiscated securities if they were left to secure for their own property as best they could. But it seems clearly preferable to recognize the claim to protective possession by this plaintiff under its obligation to act only for the conservation of the rights of the former owners than to force the possibly complicated unscrambling of these rights upon American courts. See 100 U. of Pa.L.Rev. 764, 767, in criticism of the decision below on this point.

"Again, it may be conceded that a traditional and widely held view places the situs of a debt at the locus of the certificate evidencing it. But as Judge L. Hand aptly noted in his opinion in the *Cities Service* case in 189 F. 2d at pages 746, 747, this doctrine has already lost much of its early vigor. It may still find utility in many connections. But as applied to the problems occasioned by the looting of securities by a conquering power, we believe the domicile of the corporate debtor is a much more significant point of contact than the location of the bond instrument. See 50 Mich.L.Rev. 1057, 1066.

"The Netherlands decree should be given effect, however, even if the situs of these bonds were deemed inseparable from the certificates. The district court based its decision to the contrary on the theory that international law bars recognition of such an enactment by an absent sovereign over property located within its occupied territory. The traditional sources of international law—treaties, precedent, custom, and commentary—are somewhat meager and not completely decisive on this issue. But modern authority as we view it points to the enforceability of this decree under international law.

"The nineteenth century American view that military conquest completely displaced the sovereignty of the prior possessor, see, *e.g.*, *United States* v. *Rice*, 4 Wheat. 246, 17 U.S. 246, 254, 4 L. Ed. 562; *Fleming* v. *Page*, 9 How. 603, 50 U.S. 603, 612, 13 L. Ed. 276, was substantially modified by the Regulations respecting the Laws and Customs of War on Land, ratified by the United States as an annex to the Fourth Hague Convention of 1907, 36 Stat. 2277, 2295. Since the adoption of these Regulations it is generally agreed that the occupant does not succeed to sovereignty over the occupied territory, but has only limited administrative authority. 6 Hackworth, Digest of International Law 385–6; Oppenheimer, Governments and Authorities in Exile, 36 Am.J.Int'l L. 568, 571. Article 43 of the Regulations specifies that authority as follows: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'. The word 'safety' in this article is not a literal translation of 'la vie publique', the expression used in the original French version, and a somewhat broader concept may have been intended. Schwenk, Legislative Power of the Military Occupant under Article 43, Hague Regulations, 54 Yale L.J. 393; the author of this article suggests that 'civil life' would more accurately reflect the intent of the draftsmen. *Id.* at 393, n. 1. Be that as it may, the occupant's legitimate legislative authority is limited to necessary administrative measures, see *Aboitiz & Co.* v. *Price*, D.C.Utah, 99 F. Supp. 602, and is circumscribed by various other provisions in the Regulations, of which the prohibition against confiscation of private property is the most directly relevant here. See Comment, The Law of Belligerent Occupation in the American Courts, 50 Mich.L.Rev. 1066, 1071; Note, 65 Harv.L.Rev. 527.

" While it is clear that the pre-occupation laws outside the legitimate scope of the occupant's control remain in force, Hague Regulations, Art. 43; Schwenk, *supra* at 406, the effectiveness of the absent sovereign's new legislation is not quite as certain. The Hague Regulations do not explicitly deal with this problem. Several foreign courts have, however, considered the issue; and, so far as we have been able to find, only those of Greece have refused to give effect to enactments of the legitimate sovereign applying to the occupied territory. See *Occupation of Cavalla*, Greece: Court of Thrace (1930), *Annual Digest* 1929–30, No. 292. All the others recognize the validity of such legislation, *e.g.*, *Agrocide* v. *Arsocid*, Holland: Court of Appeal, The Hague (1946), *Annual Digest* 1947, No. 142; *Public Prosecutor* v. *Reidar Haaland*, Norway: Supreme Court, Appellate Division (1945), *Annual Digest* 1943–45, No. 154; *Re Hoogeveen et al.*, Belgium: Court of Cassation (1944), *Annual Digest* 1943–45, No. 148; *Stasiuk and Jagnycz* v. *Klewec*, Poland: Supreme Court, Third Division (1927), *Annual Digest* 1927–28, No. 380; *De Nimal* v. *De Nimal*, Belgium: Court of Appeal of Brussels (1919), *Annual Digest* 1919–22, No. 311. Pitted against the array of precedent cited, the *Cavalla* case does not seem to us to merit the reliance the district court placed upon it.

" In support of its decision, the court below also pointed to a dictum in the *De Nimal* case to the effect that hostile measures aimed at combating the occupant and hampering his rule would not apply to occupied territory. Such a limitation appears quite reasonable, indeed essential; but rather than suggesting the ineffectiveness of the Netherlands decree, it supports our contrary conclusion. Obviously, absentee legislation intended to interfere with the occupant's *legitimate* rule should not be given effect. Otherwise the authority vested in the occupying power by Article 43 of the Hague Regulations would become nugatory. Mere hostility to the occupant should not, however, invalidate the absent sovereign's enactments. To have such an effect the hostile legislation must be directed against those aspects of governmental control which international law vests in the occupant. In short, the legitimate sovereign should be entitled to legislate over occupied territory in so far as such enactments do not conflict with the legitimate rule of the occupying power. This view is suggested by at least one prominent commentator on international law, who writes: ' Principle seems to demand that, assuming the new law to fall within the category of that large portion of national law which persists during the occupation and which the enemy occupant cannot lawfully change or annul, it ought to operate in occupied territory'. McNair, Municipal Effects of Belligerent Occupation, 57 L.Q.Rev. 33, 73; see also McNair, Legal Effects of War 382–3 (3d Ed. 1948). Somewhat similar is the position taken by Feilchenfeld in The International Economic Law of Belligerent Occupation 135 (1942), except that he would recognize absentee legislation in those fields not actually pre-empted by the occupant rather than those within his legal authority: 'Nevertheless, one would go too far in assuming, as has been done by various authorities, that an absent sovereign is absolutely precluded from legislating for occupied areas. The sovereignty of the absent sovereign over the region remains in existence and, from a more practical point of view, the occupant may and should have no objection to timely alterations of existing laws by the old sovereign in those fields which the occupant has not seen fit to subject to his own legislative power.'

"It has been pointed out, moreover, that refusal to recognize any new legislation by the displaced sovereign, while limiting the occupant's rule to the authority granted in Article 43 of the Hague Regulations, may well result in a hiatus of legislative control in fields inadequately covered by pre-existing enactments. Stein, Application of the Law of the Absent Sovereign in Territory under Belligerent Occupation: The Schio Massacre, 46 Mich.L.Rev. 341, 362. This author offers the rather Utopian suggestion that the occupant's recognition of legislation by the absent sovereign in this no man's land would provide one possible solution. Stein also notes the 'modern tendencies in the British and American doctrine which require the occupant to give the widest possible application in occupied territory, within the limits of his legitimate military interests, to "absent" sovereign's [*sic*] "new" laws'. *Id.* at 370. Thus it is apparent that the commentators do not view international law as precluding all recognition of absentee decrees; and our own interpretation reconciles the Hague restrictions on the occupant with the need for continuous legislation in all fields of government control.

"In view of the vagueness of Article 43, it may occasionally be difficult in a particular case to determine where the occupant's authority ends and that of the absent sovereign begins. But that determination is greatly simplified here by Article 46 of the Hague Regulations, prohibiting confiscation of private property by the occupant. Decree A–1 was aimed directly at preventing or at least discouraging such illegal seizure; hence, while unquestionably a 'hostile' measure, it merely implemented a restriction upon the occupant, rather than interfered with his legitimate rule. See Stein, United States: Recovery of Property Confiscated by Enemy Occupant, 1 Am.J.Comp.L.

Case No. 174 *Contd.*

261, 266. The fact that this decree put purchasers of foreign securities on notice to exercise greater care in ascertaining their vendor's title than is ordinarily required does not seem to us a sufficient interference with the occupied nation's economic life to render the measure invalid. Nor should we deny enforcement simply because the decree was not so successful in accomplishing its purpose of preventing enemy looting as its authors may have wished ; such enactments would become all the less effective in the future if we were to refuse recognition here. Since Decree A–1 does not conflict with any legitimate legislation or regulation of the occupant or with our own public policy, we see no reason why it should not be given effect in the present case. See 65 Harv.L.Rev. 1463, 1464. This conclusion receives further support from the fact that, so far as appears, the claim of the Netherlands does not compete with any valid rights of United States residents.

" We may add that the conclusion to which we find ourselves impelled by current doctrines of international law seems to us more necessary and appropriate to the world to which we have come than the mid-nineteenth century view followed below."

[Reports : 99 F. Supp. 655, 201 F. 2d 455.]

NOTE.—See the related case of *State of the Netherlands* v. *Federal Reserve Bank of New York et Al.*, 79 F. Supp. 966 (1948), *Annual Digest*, 1948, Case No. 8 and p. 531 (Note, 1). The instant case is noted in *University of Pennsylvania Law Review*, 100 (1952), p. 764, *American Journal of Comparative Law*, 1 (1952), p. 261, *American Journal of International Law*, 47 (1953), p. 496, *Columbia Law Review*, 53 (1953), p. 561, *International and Comparative Law Quarterly*, 2 (1953), p. 647, and *Michigan Law Review*, 52 (1954), p. 753.

With respect to the legal right of the belligerent Occupant to enact legislation concerning foreign exchange transactions, see *In re Muller's Estate*, 104 N.Y.S. 2d 133, 199 Misc. 745 (1951). See, with further respect to United States recognition of the Dutch Law considered in the instant case, *Peters* v. *McKay*, 246 P. 2d 585, 195 Or. 412 (1952),[1] and *In re Central States Power & Light Corp. et Al.*, 99 F. Supp. 157 (1951).

See also, with respect to the recognition of Czechoslovakian decrees confiscating German property, and the effort of Czechoslovakia to control the exercise of intangible property rights abroad, *Capitol Records* v. *Mercury Record Corp.*, 109 F. Supp. 330 (1952), 221 F. 2d 657, 105 P.Q. 163 (1955).

---

[1] See Case No. 152 in this volume.

Belligerent Occupation—In General—Members of Army of Occupation—Criminal Offence by National of Occupying Power—Accused Person Not a Member of Army of Occupation—Whether United States Citizens in Occupied Germany Entitled to Trial by Jury—Whether Amenable to Jurisdiction of United States Courts of Allied High Commission. **Case No. 175**

UNITED STATES HIGH COMMISSIONER FOR GERMANY *v.* MADSEN.

Germany (*United States Zone of Occupation*), *United States Court of Appeals. June* 19, 1951.

In this case the United States Court of Appeals confirmed the principle previously laid down by the United States Military Government Court in *United States Military Government* v. *Goldner*,[1] that a civilian employee of the United States War Department possessing United States nationality is not entitled to trial by jury but is amenable to the jurisdiction of the United States Courts of the Allied High Commission in respect of criminal offences committed in the United States Zone of occupation in Germany. It was further held that such person is not entitled to claim trial by United States court-martial.[2]

[Report: (1951) XII C.A.R. (U.S.) 187.]

Belligerent Occupation—In General—Status of Members of Occupation Forces—Persons Enjoying such Status—Whether Official of International Refugee Organization in Occupied Germany Entitled to Claim Status of Member of "Allied Forces". **Case No. 176**

UNITED STATES HIGH COMMISSIONER FOR GERMANY *v.* GERSHON.

Germany (*United States Zone of Occupation*), *United States Court of Appeals. December* 27, 1951.

THE FACTS.—By an agreement between the International Refugee Organization (IRO) and the United States Commander-in-Chief in the United States Zone of Germany it was provided that all officials of the IRO in occupied Germany were to be subject to the over-all supervision of the occupation authorities and were to enjoy the same privileges and immunities as civilian employees of the occupation forces. The appellant, an official of the IRO who was stationed in Germany, arranged for about 40 pounds of gold bullion to be sent to him from the

---

[1] (1949) II C.A. (U.S.M.G.) 144; *Annual Digest*, 1949, Case No. 161.

[2] See also *United States High Commissioner for Germany* v. *Barshey*, (1951/52) XIII C.A.R. (U.S.) 419.

Case No. 176 Contd.

United States. Ordinarily the importation of the gold would have been a criminal offence, but an Allied High Commission Law provided that members of the Allied Forces were entitled to import "tangible property" into the territory of the Federal Republic of Germany unless such property was intended for resale, in which case the importation would also constitute a criminal offence if undertaken by members of the Allied Forces.

Held: that the appellant was a member of the Allied Forces within the meaning of the Allied High Commission Law here referred to. The following extract from the judgment of the Court is only concerned with this particular point: [1]

"The provisions of AHC Law No. 40 are applicable to 'members of the Allied Forces'. All of the penal provisions of the law specifically refer to that category of persons.[2] Whether or not the appellant is a person subject to the penal provisions of this law depends upon the definition of 'Allied Forces'. This term is defined to include the 'Occupation Authorities' which, in turn, include the Council of the Allied High Commission, the High Commission and the Allied Organizations and *persons exercising power on their behalf.*[3]

"We believe that the International Refugee Organization (IRO) is an agency exercising such a power on behalf of the occupation authorities and as such is included within the terms 'Occupation Authorities' and 'Allied Forces', as those expressions are used in the law containing the official definitions with which we are here concerned.[4] By an agreement dated 28 July 1948 between the International Refugee Organization and the Commander-in-Chief, European Command, the former undertook to conduct certain operations in respect to the care and processing of refugees for which the occupation authorities have a primary responsibility. This agency has been accredited to the European Command in its capacity as a non-military agency.[5] The personnel of this organization have and continue to receive logistic support from the Armed Forces of the United States, and payment for the services of its German employees generally employed by the Allied Forces.[6] The agreement of July 28, 1948, contains detailed provisions for the over-all supervision of IRO activities by the occupation authorities. They are of such a nature as to make it clear that the organization is carrying out responsibilities of the Commander-in-Chief and exercising power in his behalf. The status of IRO personnel in general is the same as that of employees of the occupation forces, and they enjoy the same privileges and immunities.[1]

---

[1] On the facts it was found that the appellant had imported the gold for resale, and that for that reason he was guilty of the offence referred to above.

[2] See Articles 1, 2, 3 (paras. 1, 2 and 3), and 4 (paras. 1 and 2).

[3] AHC Law No. 2, Article 1, paras. 1 and 3.

[4] See *supra*, n. 2.

[5] See EUCOM Circular No. 2, "Assistance to non-military agencies and ndividuals", dated May 30, 1949.

[6] Agreement dated July 28, 1948, Sec. VI.

"We hold the appellant to be a member of the Allied Forces and subject to the provisions of AHC Law No. 40."

[Report: (1951/2) XIII C.A.R. (U.S.) 287.][2]

Belligerent Occupation—Nature of—Allied Occupation of Germany—Nature of Authority of French Commander-in-Chief. **Case No. 177**

In re SOCIÉTÉ BONDUELLE ET CIE.

France, Conseil d'État. June 29, 1951.

THE FACTS.—This was a claim for compensation by a French Company against the French State in respect of damage alleged to have been caused to the Company by the fault of the Office for External Commerce set up by Ordinance No. 28 of the French Commander-in-Chief in Germany. The question before the Court was whether, in setting up the Office for External Commerce, the Commander-in-Chief was acting as the agent of the French State.

Held: that the French State could not be considered to have any responsibility for the alleged fault of the Office for External Commerce. In establishing and operating that Office the Commander-in-Chief exercised functions appertaining to the Government of Germany. The Court said:

"A Declaration made at Berlin on June 5, 1945, by the representatives of the Allied Supreme Commands in the name of the French Republic, the United States of America, the United Kingdom and the Union of Soviet Socialist Republics, states that the Governments of the four above-mentioned Allied nations 'assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority . . .'. In conformity with another Declaration made at Berlin the same day concerning the zones of occupation in Germany, the President of the Provisional French Government, by Decree dated June 13, 1945, established an office of commander-in-chief entrusted with the function of 'exercising the powers of government in German territories occupied by the French forces'. For

---

[1] Agreement dated July 28, 1948, Sec. VIII, 12*a*: "IRO personnel are subject to Military Government law and courts for offenses committed by them in the U.S. Area of Control. IRO and IRO personnel shall have in general the same privileges and immunities as civilian employees of the occupation forces who are in the same status."

[2] See also *United States High Commissioner for Germany* v. *Janson*, (1951/2), XIV C.A.R. (U.S.) 177.

Case No. 177 *Contd.* the purpose of giving effect to Law No. 53 of the Supreme Inter-Allied Command concerning the control of business transactions in Germany, the French Commander-in-Chief established, by Ordinance No. 28 of December 29, 1945, an Office for External Commerce of the French zone of occupation, the function of which was to ' prepare, effect and follow up the material operations connected with imports and exports '. It appears from the foregoing that in organising that service and operating it, the French Commander-in-Chief must be regarded as exercising a function appertaining to the Government of Germany. He does not, in that matter, act as a public authority of the French State. The French State accordingly is not responsible for the fault of the Office for External Commerce."

[Report : *Sirey*, 1951, III, p. 107.]

Case No. 178 **Belligerent Occupation—Nature and Effects of—Non-Political Treaties between Occupied Country and Neutral Country—Hague Convention on Civil Procedure, 1905—Whether Continuing to be Applicable between Switzerland and Germany—Whether Binding on Occupant—Enforcement of Order of Swiss Court.**

Enforcement of Foreign Judgments (Switzerland) Case.

German Federal Republic, District Court of Stuttgart.
April 24, 1951.

The Facts.—In 1939 a Swiss court gave a judgment in favour of a Swiss national against a debtor resident in Germany, and ordered the latter to pay the costs of the proceedings. By virtue of the Hague Convention on Civil Procedure of July 17, 1905, to which both Germany and Switzerland were parties, the Swiss creditor was entitled to enforce the order for costs in Germany without " additional requirements ". Some time after 1945, and while Germany was an occupied country, he accordingly applied for payment under the order. The debtor contended that the Hague Convention was no longer applicable between Switzerland and Germany ; alternatively, that even if it was, he could not be compelled to make payment under the order without the prior consent of the exchange control authorities.

Held : (i) that the Hague Convention on Civil Procedure continued to be applicable between Switzerland and Germany ;

(ii) that, although the Convention was binding on occupied Germany, it was not binding on the Occupant, and that as the exchange control laws were laws enacted by the Occupant they took precedence of the Convention ;

(iii) that, this being so, and the exchange control laws providing that foreign judgments could not be satisfied without the prior consent of the exchange control authorities, such consent was required, notwithstanding that the Convention provided for the execution of foreign judgments without " additional requirements ". The Court said :

" The lower Court was right in saying that as between the Federal Republic of Germany and the Swiss Confederation the provisions of the Hague Convention on Civil Procedure of July 17, 1905, continue to be applicable. . . . However, we cannot accept the view of the lower Court when it says that the consent of the exchange control authorities is not required. While it is true to say that the Contracting Parties are precluded by international law from making consent to the execution of a judgment dependent on requirements additional to those provided for in the Convention, and that the latter, by virtue of Article 25 of the Basic Law (Constitution), forms part of existing constitutional law, the lower Court overlooks the following facts : that the binding force of the Convention is limited to the Contracting Parties ; that the Occupying Powers—certainly in so far as concerns the territory of the German Reich or the Federal Republic—have not acceded to the Convention ; that the Occupying Powers are not the successors in title of the German Reich and accordingly are not bound by treaties concluded by the latter ; and that the exchange control laws are not Federal law, but law enacted by the Occupant. In view of the fact that the law of the Occupant takes precedence of the Basic Law, . . . the issue of an order for the execution of a judgment in favour of a person resident abroad requires the consent of the exchange control authorities."

[Report : *NJW*, 4 (1951), p. 850.]

Belligerent Occupation—Nature and Effects of—Effect on National Character of Territory Occupied—Effect on Enemy Character of Persons Residing in Occupied Territory—Executory Contracts—Discharge of Debts During Enemy Occupation —Payment Not Made Across Line of War—The Law of India. **Case No. 179**

SEETHALAKSHMI ACHI *ET AL.* *v.*
V. T. VEERAPPA CHETTIAR.

India, High Court, Madras.
(Satyanarayana Rao and Raghava Rao JJ.)
April 3, 1951.

THE FACTS.—The plaintiffs were a firm of moneylenders resident in Burma, and the defendants borrowed money from them in Burma before the outbreak of the Second World War.

Case No. 179 *Contd.*

During the course of the Second World War the Japanese overran and occupied Burma. Both the plaintiffs and the defendants were, at the material times, British subjects. During the Japanese occupation, agents of the defendants paid to an agent of the plaintiffs the nominal amounts owed by the defendants to the plaintiffs, in Japanese currency, in pursuance of the Japanese laws in force in Burma. Subsequently, the plaintiffs claimed repayment of these sums in other currency, contending that the former payments were invalid (*a*) because the payment in Japanese currency was illegal and its effect a nullity, and (*b*) because the transaction occurred in enemy territory and consequently the agent of the plaintiffs had no authority to give a valid receipt therefor, his agency having terminated by reason of the occupation. A Subordinate Judge, in first instance, decreed judgment for the plaintiffs. He declined to make an order, as claimed by the defendants, for the refund of money already paid to the plaintiffs, namely, to their agents in Burma. The defendants appealed.

Held: that the appeal must be allowed. " The enemy character of a person under the English common law attaches to a person, irrespective of his nationality or his domicile, if he is living or residing in enemy territory or enemy-occupied territory and the test is an objective test depending upon facts. The occupation by an enemy must be an effective occupation with the intention to hold it as if by conquest. It must be total subjugation. The occupation should not be of the slighter character for military strategical reasons, but of the more comprehensive nature. The enemy must have effective control, though provisional, and must treat it as a settled acquisition. If the occupation is in a fluid state, swinging backwards and forwards, the national character of the territory would not be altered. . . .

" On principle and on authority, when a creditor and his agent and the debtor are not across the line of war but in the same belligerent State and on the same side of the line of war, there is no reason prohibiting the payment of a debt by the debtor and a receipt by the creditor. Payments made by an agent of the debtor to an agent of the creditor, where both the agents were living in the same enemy-occupied territory, are valid and the payments must be upheld."

Satyanarayana J. said (*inter alia*) : ". . . The questions raised in the appeal are :

" (i) Whether Burma was an enemy territory at the time of the payment ?

" (ii) If Burma was an enemy territory, whether the plaintiffs' agent who admittedly resided in Burma during the occupation of the territory by the Japanese had authority to give a valid discharge ?

" (iii) Whether the payment made in Japanese currency is valid ?

" The last question does not present any difficulty . . . after Burma was restored to British Government, an Act entitled the Japanese Currency (Evaluation) Act, 1947 . . . was passed which validated payments made in Japanese currency during the occupation of Burma by the Japanese. . . .

" The most important question is whether the agent of the plaintiffs . . . at the time he received payments from the agent of the defendants on 5th October 1944 had authority to give a valid discharge on behalf of the plaintiffs. . . .

" The argument that the agency of the agent terminated by reason of the occupation of the territory by Japan is founded on the common law doctrine of England which, it was contended, applies to British India at least by way of justice, equity and good conscience. Reliance was also placed upon the Defence of India Rules made by the Government of India prohibiting trading with the enemy by virtue of the power vested in the Government under the Defence of India Act, 1939.

". . . The English common law was recently subjected to a critical and . . . to a careful examination by the House of Lords in *Sovfracht* (*V/O*) case [[1943] A.C. 203]. . . . It is unnecessary therefore to traverse the same field once again by subjecting the authorities on the subject to a detailed examination.

". . . There are two fundamental principles of English common law which are made applicable to enemy subjects in time of war. [His Lordship then quoted from the remarks of Lord Wright ([1943] A.C. 203) to the effect that :

> " one [of the principles to which he had referred] is that he (enemy subject) is denied access to the English Courts, the other is that British subjects are prohibited from trading with him and from all intercourse or communication across the line of war. . . ."

and continued :]

" It would seem on an analysis of these principles that the very foundation or the basis for them is that if there is war between belligerents, a person is an 'enemy subject', which implies that he is in some way connected with the enemy territory or enemy-occupied territory."

His Lordship then asked " What is war ? " and quoted from Hall, *International Law*, at page 60, remarking that " This definition has judicial approval in *Driefontein Consolidated Gold Mines* v. *Janson* . . ." ([1900] 2 Q.B. 339 at 343) which his Lordship also quoted. His Lordship then continued :

" Who is an enemy ? It is important to consider the test which determines the enemy character of a person. Under the

Case No. 179 *Contd.* law in England the test of enemy character is not nationality but residence or even living in enemy territory for whatever purpose it may be. It is not necessary that the person, even if he is a British subject, should have a domicile in the sense of the civil law, viz., the place of a man's permanent house, or even of indefinite residence. If a person, whether a neutral or a British subject, lives in enemy territory even for purposes of business, he is treated in law as an 'enemy subject'. Of course, what applies to enemy territory applies equally to enemy-occupied territory. The test of enemy character has nowhere been so clearly laid down as by Lord Lindley in *Jonson* [*sic*] v. *Driefontein Consolidated Mines, Limited* [[1902] A.C. 484, 505] . . . in these words : . . .

[The learned Judge then quoted the passage he had cited; referred also to *The Portland*, (1800) 3 C.Rob. 41 ; 165 E.R. 678, and added :]

" From this passage it is evident that the term 'domicile' is used in a two-fold sense ; one is in relation to the person without reference to his commercial intercourse and the second is in regard to the place of business which is styled by Dicey as a 'commercial domicile' of a person. In particular cases the two domiciles of persons may be the same, or may be different, but it is impossible to ignore the distinction. The subject is more elaborately discussed by Professor McNair in Legal Effects of War, in Chapter II. In Volume I, Halsbury's Laws of England, Second Edition (Lord Hailsham), at page 447, it is stated that

> 'an alien enemy is one whose Sovereign or State is at war with the Sovereign of England, or one who is voluntarily resident or who carries on business in an enemy's country even though a natural-born British subject or a naturalised British subject'. "

His Lordship also quoted the same work with regard to the enemy character of corporate entities, and referred to the remarks of Viscount Simon L.C. and Lord Wright in *Sovfracht (V/O)* v. *Van Udens Scheepwaart en Agentuur Maatschappij (N/V. Gebr.)*, [1943] A.C. 203, at 211 and 219 respectively, and continued as follows :

" It follows from these authorities that the enemy character of a person under the English common law attaches to a person, irrespective of his nationality or his domicile, if he is living or residing in enemy territory or enemy-occupied territory and the test is an objective test depending upon facts. . . . Webber in his book on the Effect of War on Contracts, 1946 Edition, discusses this topic in Chapter III at page 89.

" It becomes now necessary to consider the more difficult question of the nature of occupation required for the purposes of these rules to change the national character of a State to constitute an enemy-occupied territory. There is no difficulty in determining an ' enemy territory '. It is the area under the sovereignty of a power at war and of which it is the owner of the soil. What is the quality of occupation required to make a territory occupied by an enemy ' an enemy-occupied territory ' for the purpose of the common law ? The Trading with the Enemy Act, 1939, and its counterpart in India, sub-rule 2 of rule 2 of the Defence of India Rules, substantially agree and include within the definition the area ' in the occupation of a power with whom His Majesty is at war '."

His Lordship then discussed *Cremidi* v. *Powell* (*Gerasimo's case*), (1857) 11 Moo. P.C. 88 ; 14 E.R. 628, observing that Lords Wright and Porter in the *Sovfracht* (*V/O*) case " in a way differed from the view of Lord Kingsdown in *The Gerasimo's case* ".

He continued : " An occupation of a territory by the enemy may be an occupation for military or strategic purposes and the territory may be subjected by the hostile force which occupies it so as to subject it to such control as it may think fit to exercise, or it may, having occupied it by cession or conquest or some other means, permanently or temporarily have incorporated it with the territory over which the enemy has undisputed sovereignty. There may yet be an intermediate position when the enemy without actual and formal annexation of the territory may hold the dominion and control over the territory for a sufficiently long period and the occupation may be of such a relatively permanent character as to indicate an intention to hold it. The belligerent State may in such a case assume some kind of administration over it. An occupation of this character is something more than mere occupation for military purposes [but] falls short of complete annexation or incorporation with its own territory. Of these three possibilities, Mr. Lushington, a Judge of the Admiralty Court, who decided the issue in *The Gerasimo's* case in the first instance, accepted the first position. . . .

" This view has been regarded by all the authorities as erroneous and an occupation of such a nature has not the effect of altering the national character of the territory. The second view was held by . . . Lord Kingsdown, in *The Gerasimo's* case. The intermediate view has been established by the decision of the House of Lords in *Sovfracht* (*V/O*) case."

His Lordship then quoted at length from Wheaton on *International Law*, Volume II, Sixth Edition, at page 780, drawing a distinction between occupation and conquest. He continued :

" In the Seventh Edition of Wheaton's *International Law*, Volume II, pages 233 and 234, the same definition of conquest is retained. The point for consideration therefore is, is there

Case No. 179 *Contd.* a substantial difference between the view of Lord Kingsdown in *The Gerasimo's* case . . . and the view expressed by the House of Lords in *Sovfracht* (*V/O*) case."

His Lordship then considered at length the facts and the Judgment of the Privy Council in *The Gerasimo's* case, and remarked that, in that case, the Judicial Committee relied on Lord Stowell's definition of " the meaning of the term ' dominions of the enemy ' " in *The Fama* ((1804) 5 C. Rob. 106 ; 165 E.R. 714). He then continued : " It was pointed out later in the course of the judgment that the national character of a place is not changed by the mere circumstance that it is in the possession and under the control of a hostile force and that this principle was acted upon by the Lords of Appeal in the *St. Domingo* cases of the ' *Dart* ' and ' *Happy Couple* ', where the rule operated with extreme hardship. The same is the opinion of Lord Stowell in *The ' Manilla '* [(1808) Edw. 1 ; 165 E.R. 1011] where it was held on the facts of that particular case that there was no declaration of any sort by the British to constitute the Islands of St. Domingo an enemy territory. In order to further reinforce this conclusion the Judicial Committee relied on *Donaldson* v. *Thompson* [(1808) 1 Camp. 429 ; 170 E.R. 1010] and the opinion of Lord Stowell in the case of *The Bolletta* [(1809) Edw. 171 ; 165 E.R. 1071]. At page 100 [*The Gerasimo's* case, *loc. cit.*] it is pointed out that Lord Stowell recognised in *The ' Bolletta '* the distinction between hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by length of time. As the occupation by the Russians in the case before the Privy Council was only a military occupation for strategical considerations, it was held that Moldavia was not an enemy territory. [His Lordship then referred to Lord Wright's summary of the legal position with regard to occupation, and he passed to the decision of Marshall C.J. in the United States case of *Thirty Hogsheads of Sugar* v. *Boyle* ((1815) 9 Cranch 191 ; 13 U.S. 189), and to that of Story J. in *The United States* v. *Rice* ((1819) 4 Wheat. 246 ; 17 U.S. 245) and continued :] Lord Wright [[1943] A.C. 203] pointed out that Lord Kingsdown did not consider the view of Lord Stowell in *The ' Hoop '* [(1799) 1 C. Rob. 196 ; 165 E.R. 146] and Marshall C.J. in *Thirty Hogsheads of Sugar*. He however did not dissent from the ultimate conclusion of Lord Kingsdown on the facts of the case as the occupation in question by the Russians of Moldavia was purely of a temporary nature and for a strategical purpose. . . ."

His Lordship then quoted again from the Judgment of Lord Wright ([1943] A.C. 203), and continued : " The test laid down by Lord Wright in this speech practically amounts to what is described by Wheaton as the essence of conquest. . . . What is insisted on by Lord Wright is not mere occupation, but subjugation."

His Lordship quoted further from Lord Wright's remarks, and proceeded also to discuss the facts of the case which gave rise to this decision. He quoted Lord Porter and Lord Simon L.C. in the same case, concluding that " From the foregoing discussion, it would follow that the only difference between the House of Lords and Lord Kingsdown is this, that a formal declaration of a conquest, cession or annexation is not needed to change the national character of the territory according to the House of Lords. Lord Kingsdown in terms does not himself express and insist on such formality though Lord Stowell laid down that requirement in the case of *The ' Fama '*. The essence, however, of the two views is that the occupation must be an effective occupation with the intention to hold it as if by conquest. It must be total subjugation. The civil and military administration over the country must be exercised by the enemy to the exclusion of the former government. The occupation should not be of the slighter character for military or strategical reasons, but of the more comprehensive nature. The enemy must have effective control, though provisional, and must treat it as a settled question. If the occupation is in a fluid state, swinging backwards and forwards, as in the case of Korea at present, the national character of the territory would not be altered. This approximates to the test laid down by Wheaton in defining what constitutes conquest.

" The question of change of the character of the territory, therefore, must be determined on the facts of each case and inferred from the evidence available in the case. The decision in *Sovfracht* (*V/O*) case proceeded practically on the assumption that the control by Germany of Holland was effective. The intention to keep the territory as an acquisition and the character of occupation must be inferred from the facts as satisfied by evidence, as pointed out by Lord Greene M.R. in the later decision in *Anglo-International Bank Ld., In re* [[1943] 1 Ch. 233]. [His Lordship then quoted from the judgment of Lord Greene (*loc. cit.* p. 241), and said :] In view of the fuller exposition of the law on the subject by the House of Lords in *Sovfracht* (*V/O*) case it is unnecessary to refer to the decisions in *The Gutenfels* [[1916] 2 A.C. 112] *Société Anonyme Belge des Mines d'Aljustrel* (*Portugal*) v. *Anglo-Belgian Agency, Limited* [[1915] 2 Ch. 409] and *The Leonora* [[1919] A.C. 974]. McNair discusses the topic of what amounts to belligerent occupation of a territory by the enemy at pages 322 to 329 [*loc. cit.*].

" The common law of England has established the doctrine of non-intercourse between residents in belligerent states during a state of war. In America, however, the prohibition against intercourse is confined to commercial intercourse, though the decisions cannot be said to be altogether uniform." His Lordship mentioned *The Rapid*, (1814) 8 Cranch 155 ; 12 U.S. 154,

Case No. 179 *Contd.*

and *The Emules* (1813) 1 Gall. 563, and distinguished the decision of Gray J. in *Kershaw* v. *Kelsey* (100 Mass. 561), and continued : " After reviewing the principal English and American authorities, the learned Judge [Gray J. in *Kershaw* v. *Kelsey*] stated the law in these terms: . . . [His Lordship read from the judgment in *Kershaw* v. *Kelsey*, and proceeded as follows :]

" It has been authoritatively decided, however, by the Court of Appeal in England in *Robson* v. *Premier Oil and Pipe Line Co.* [[1915] 2 Ch. 124] that the prohibition of common law of intercourse with an alien enemy is not limited to commercial intercourse and the view of Gray J. in *Kershaw* v. *Kelsey* was dissented from. The opinion of Lord Stowell in *The 'Hoop'* and *The 'Cosmopolite'* [(1801) 4 C. Rob. 8 ; 165 E.R. 516] and that of the President of the Probate Division in *The Panariellos* [(1915) 84 L.J. Pro. 140 ; 138 L.T.J. 484] have been taken in England as establishing the wider prohibition of intercourse and the basis of the prohibition is stated by Pickford L.J. in unambiguous terms thus :

" ' The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either of principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction.'

" All kind of intercourse, therefore, according to the English common law, whether commercial or otherwise, is inconsistent with a state of war between two belligerent countries and is therefore absolutely forbidden. It need not be established that, in fact, there was intercourse with the enemy. It is enough if there is a possibility of intercourse. This decision was approved by the House of Lords in *Ertel Bieber & Co.* v. *Rio Tinto Company* [[1918] A.C. 260].

" It follows as a corollary of the principle of prohibition of intercourse that an executory contract which either involves intercourse or whose continued existence must in some way operate against public policy is abrogated as a result of war. Of course, it is not permissible during a state of war for residents of belligerent states to enter into contracts. Such contracts are prohibited by law. The law interferes with executory contracts by dissolving them. [His Lordship then quoted from the Judgment of Lord Dunedin in *Ertel Bieber* v. *Rio Tinto*, and remarked :]

" The learned Lord agreed with the judgment of the Court of Appeal in *Robson* v. *Premier Oil and Pipe Line Co.* . . . and examined and considered in detail the cases of *The 'Hoop'* [*loc. cit.*], *Furtado* v. *Rogers* [(1802) 3 Bos. & P. 191 ; 6 R.R. 752], the judgment of the Queen's Bench in 1857 in *Esposito* v.

Bowden [(1857) 7 E. & B. 763], and the opinion of Lord Reading C.J. in the case of *Porter* v. *Freudenberg* [[1915] 1 K.B. 857, 866]. [His Lordship discussed this judgment and referred again to McNair (*loc. cit.*) Chapter IV and Webber (*loc. cit.*) Chapter V. He continued :]

" We are only concerned in this case with the restricted narrow question of the effect of war on a contract of agency. It is therefore unnecessary to consider its effect on other contracts and the rights and the liabilities of the contracting parties thereunder. As pointed out by Lord Wright in *Sovfracht* (*V/O*) case persons residing in enemy territory, so long as the enemy occupation lasts, are on the wrong side of the line of war and therefore they are shut off from communication and intercourse and from commercial dealing in the same manner and to the same extent as if they were original enemies such as the nationals or residents in the enemy territory. The learned Lord says, at page 230, in *Sovfracht* (*V/O*) case :

" ' This rule is only concerned with relations across the line of war. So far as concerns the internal commerce and ordinary activities of those in the occupied territory, such as those activities which the Master of the Rolls enumerates, the rule has no application, even though these activities go to promote the advantage of the German State and strengthen its war effort.'

" Both Lord Wright and Lord Porter agree that the agency of the solicitor in that case to act on behalf of his client who was an enemy subject terminated with the enemy occupation of the territory. Lord Porter at page 254 states the rule to be :

" ' Ordinarily, when the principal becomes an enemy the authority of the agent ceases on the ground that it is not permissible to have intercourse with an enemy alien, and the existence of the relationship of principal and agent necessitates such intercourse.'

And relies for this view upon the decision of the House of Lords in *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie* [[1918] A.C. 239] which related to a case of partnership. Both the learned Lords differ from the view taken in *Tingley* v. *Muller* [[1917] 2 Ch. 144] and express their concurrence with the dissenting speech in that case and the view of Lord Sumner in *Rodríguez* v. *Speyer Brothers* [[1919] A.C. 59, 130]. Viscount Simon L.C. agrees with the view expressed by Lord Porter. It may, therefore, be taken that, so far as the English common law is concerned, the principle of abrogation of agency when either the principal or the agent becomes an alien [enemy ?] is firmly established notwithstanding the view expressed in the earlier decision. [His Lordship discussed the facts and the decisions in these cases and continued :]

" The intercourse prohibited is across the line of war, and

Case No. 179 *Contd.*

. . . does not and cannot prohibit intercourse or internal commerce and ordinary activities of those in the enemy occupied territory *inter se*, so long as they are on the same side of the line of war, even if such activities and such trade have the effect of conferring an advantage upon the enemy. . . .

" Of the two fundamental principles of the common law of England which have been under consideration till now in India, the procedural incapacity of an alien enemy to sue, *i.e.*, to sustain a *persona standi in judicio*, is enacted in section 83 of the Code of Civil Procedure and has received statutory recognition. For the limitations therefore for the application of that principle, one has to look to the provisions of section 83 of the Code of Civil Procedure. It seems to have been adopted and applied to India even under the Code earlier [than] the Code of 1882.

". . . The other branch of the English common law regarding prohibition against intercourse between residents in belligerent States and its effects on contracts has not been applied to India by any statute. It can only apply to India by way of justice, equity and good conscience in the absence of any rule applicable to the situation and enacted by any statute."

His Lordship examined the facts and considered the judgments of two decisions referring to the application of the rules of English common law concerning intercourse with an enemy to the law of India, viz., *Wuthrik* v. *David* (1916) 31 M.L.J. 860, and *Soorthingjee Sakalchand* v. *Mahomed Nasurudeen* (1916) 32 M.L.J. 146. His Lordship considered the problem of the legality of the Japanese currency issued in Burma after the British had evacuated their forces and decided that this currency could not be termed " currency " in any ordinary sense of the word, and that its existence certainly did not indicate that the Japanese had introduced a civil administration of their own into Burma. Considering the nature of the Japanese occupation he observed that " Courts were functioning, the magisterial officers were functioning, and the revenue officers were functioning. The head of the Government was Ba Ma, a Burman. Administration was being carried on by Burmans under Japanese control. We do not know . . . what the nature of this control was and what the relationship between Ba Ma and the Japanese Government was. It must be remembered that it was the policy of Japan when it entered war to establish what was then styled a co-prosperity sphere of Asians and it promised independence to Burma. The Ba Ma Government, as it is called, may have been an independent Government by Burmans ; we do not know the details. . . . The Ba Ma Government was running all the departments of the administration. . . . It is therefore difficult to conclude . . . that the Government of Japan had established anything like a civil administration under its control and authority besides the military occupation which could effectively exercise dominion and control over the territory."

Following Lord Greene M.R. in *In re Anglo-International Bank Limited* [1943] 1 Ch. 233, his Lordship held that the onus of proving a change of nationality of a territory or State lay upon those alleging such a change, and in this case there was no evidence that the national character of Burma, or its territories, had changed during the Japanese occupation. Thus he concluded that " the plaintiff . . . has failed to establish that at the time the payment was made by the defendants' agent to the plaintiff's agent, Burma was an ' occupied enemy territory '. This conclusion is sufficient to dispose of the case.

" But even otherwise, the payments . . . will be good and valid as the defendants' agent and the plaintiff's agent were both living in the same enemy-occupied territory, and as the creditor had an admitted agent in Burma and the debtor had also an agent in Burma who made the payment and both being enemies, there is no ground for treating the payment as invalid. Applying the principle of the American decisions, there is nothing to indicate that there was any possibility of intercourse or any intercourse between the plaintiff and his agent."

His Lordship held that even if Burma were to be regarded as " an enemy-occupied " territory according to British statute law, still the plaintiff's case must fail, since the payment was made by a party living in that territory to a party living there, and was not made across the lines of the contending armies. He finally concluded : " The appeal is accordingly allowed and the decree of the lower Court is set aside and the plaintiff's suit is dismissed with costs throughout ".

[Report : I.L.R. [1952] Mad. 361.]

Belligerent Occupation—Effects of—Powers and Duties of Occupant—Japanese Occupation of Malaya—Administration of Funds Normally Operated by Sovereign—Issue of Special Currency by Occupant—Validity of Transactions in Such Currency—Legal Effect of Such Transactions after Termination of Occupation—Articles 48 and 53 of Hague Convention No. IV—Debtor and Creditor (Occupation Period) Ordinance, 1947—The Law of Malaya. **Case No. 180**

PLANTERS' LOANS BOARD *v.* MANAGALAM.

Federation of Malaya, High Court.
(Wilson J.)
April 7, 1951.

THE FACTS (as stated by the Court).—" This is an Originating Summons under which the Planters' Loans Board require Madam S. Managalam, the defendant, to show cause why a certain piece of land in the district of Kuala Lumpur should not be sold by public auction for the recovery of all principal moneys, charges, expenses, fees, interest and costs due to the Board in respect of two charges. . . . The facts are that the defendant borrowed two sums of $22,000 and $3,000 respectively from the plaintiff and charged the land in question to secure repayment to the plaintiff of these sums by two charges dated the 8th day of August, 1940, and the 22nd day of January, 1941, respectively. Both these sums were repayable by half-yearly instalments at specified times. None of these instalments was paid; in fact, nothing at all was repaid until the 17th day of August, 1945, when I find as a fact that a sum of $31,189.52 in repayment of the amount owed by the defendant to the plaintiff was paid voluntarily and without demand to a Custodian of Property in whom the property of the plaintiff had been vested by an Order or Decree of the Japanese occupying power.

" It has been argued by Counsel for the plaintiff that there are three issues for the decision of the Court. . . . ' 1. Whether the debts owed by the defendant on the security of the said Charges . . . were debts owed to the Government of the Federated Malay States? 2. If the answer to 1 is in the affirmative, whether the payment of $31,189.52 in Japanese occupation currency made by the defendant to the Japanese Custodian . . . on the 17th day of August, 1945, was, in law and apart from any statutory enactment brought into force after the 31st day of March, 1946, a good and valid payment of the whole of the debts owed by the Defendant . . . ? 3. If the answer to 1 is in the affirmative, whether the said payment of $31,189.52 in Japanese occupation currency made by the Defendant as aforesaid falls to be revalued under the provisions of the Debtor and Creditor (Occupation Period) Ordinance, 1948? ' "

Held: that (1) " the Planters' Loans Board was a servant or agent of the Government of the Federated Malay States; (2) the Japanese occupying authorities were entitled to administer the Planters' Loans Funds; (3) the Government of the Federation of Malaya is bound by the provisions of the Debtor and Creditor (Occupation Period) Ordinance, 1948 ". According to international law a belligerent Occupant is responsible for the administration of the territory under his occupation and for the maintenance of order and public safety there. To this end he succeeds temporarily the sovereign of the territory so far as is necessary for the functions of government and local administration.

The Court said: " *The first issue.*—The Planters' Loans Board is a statutory Board created by the Planters' Loans Fund Enactment, Cap 131 of the Laws. In the case of *Tamlin*

v. *Hannaford,* Denning L.J., who read the judgment of the Court of Appeal, stated at page 25: 'The only fact in this case which can be said to make the British Transport Commission a servant or agent of the Crown is the control over it which is exercised by the Minister of Transport; but there is ample authority both in this Court and in the House of Lords for saying that such control as he exercises is insufficient for the purpose. (See *Cannon Brewery Co. Ltd.* v. *Central Control Board* (Liquor Traffic).) When Parliament intends that a new corporation should act on behalf of the Crown, it as a rule says so expressly, as it did in the case of the Central Land Board by the Town and Country Planning Act, 1947, which was passed on the very same day as the Transport Act, 1947. In the absence of any such express provision, the proper inference, in the case, at any rate, of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department.' The Court held that the British Transport Commission is not a servant or agent of the Crown. Section 33 of the Town and Country Planning Act, 1947, states specifically that the functions under the Act of the Board and/or their officers concerned shall be exercised on behalf of the Crown. Those words are quite specific and so far as this issue is concerned it only remains to consider whether there is any provision of the Planters' Loans Fund Enactment which expressly provides that the Board should act on behalf of the Government. The long title to the Enactment is as follows: 'An Enactment to incorporate a Board to manage loans by the Government for agricultural and other purposes and to provide for certain terms of such loans'. The preamble to the Enactment states that the Government has set apart a sum of $4,000,000 of public money for the making of loans on the security of lands situated in the Federated Malay States.

"Neither the long title nor the preamble is part of the Enactment, but both indicate that the legislature had in mind the making of loans by the Government and the establishment of a Board to manage those loans. Section 3 of the Enactment is as follows: 'The control and management of the Fund shall, subject to the provisions of this Enactment, be vested on behalf of the Government in a Board consisting of not less than three persons or more than seven persons'.

"I have come to the conclusion that when a loan under this Enactment is granted, it is a loan by the Government to the individual to whom it is granted, and that the Board in its control and management of the fund was a servant or agent of the Government of the Federated Malay States.

"*The second issue.*—There would appear to be no direct authority on the point raised in this issue. The regulations regarding the laws and customs of war on land are to be found in the Annexe to the International Convention concerning the

Case No. 180 *Contd.* Laws and Customs of War on Land signed at the Hague on the 18th of October 1907, and ratified by Great Britain on the 27th November 1909, and by Japan on the 11th September, 1912, with a reservation in regard to Article 44 which is not material to this case. Article 48 of the regulations is as follows: 'If, in the territory occupied, the occupant collects the taxes, dues and tolls payable to the State, he shall do so, as far as possible, in accordance with the legal basis and assessment in force at the time, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the national Government had been so bound'. Article 53 of the regulations provides that an army of occupation may take possession of cash, funds, and realizable securities which are strictly the property of the State. The question is whether the occupying power, that is to say, the Japanese were entitled to take control and management of the Planters' Loans Fund. This must depend on the rights and duties of an occupying power. As I have said, there is no direct authority, and one can only look for guidance from such authorities as the authors of Oppenheim's International Law and of the Legal Effects of War by McNair and of Chapter XIV of the Manual of Military Law on the Laws and Usages of War on Land issued by Command of the Army Council. At page 341 of Oppenheim Vol II, revised 6th Edition, it is stated that as the occupant actually exercises authority and as the legitimate Government is prevented from exercising its authority the occupant acquires a temporary right to the administration over the territory and its inhabitants. At page 342 it is stated that the occupant has the duty of administering the country according to the existing laws and the existing rules of administration. Article 43 of the regulations referred to above lays down that the occupant shall do all in its power to restore and ensure as far as possible public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country. Section 353 of Chapter XIV of the Manual of Military Law states *inter alia* that during occupation of enemy territory the occupant should only exercise such power as is necessary for the purposes of the war, the maintenance of order and safety, and the proper administration of the country. It appears to me that the Japanese authorities during the period of occupation had the power and indeed the duty of administering the government of the territory not only in the interests of themselves but also of the inhabitants so far as consistent with their own safety. I have come to the conclusion that they were entitled to administer this fund which apparently they, in fact, did by vesting the property of the Board in a Custodian of Property and that the payment made to the Custodian on the 17th day of August, 1945, was in law apart from any statutory enactment brought into force later a good and valid payment for the whole of the debts owed by the defendant on the security of the charges on the land. It is true that it has been agreed between the parties that at midnight on the 14th August, 1945, the Emperor of Japan commanded all armed forces of the Japanese Empire to cease active operations and that by a Proclamation dated the 15th August, 1945, Admiral Lord Louis Mountbatten, Supreme Allied Commander, South-East Asia, proclaimed the establishment of a Military Administration throughout Malaya, but that the *de facto* establishment of such Military Administration did not take place until some date not earlier than the 29th August, 1945. It seems clear that on the 17th day of August, 1945, the Japanese occupation forces were still in occupation of Malaya, and administering the Government of it, and were still administering the Government on the 24th day of August, when the Custodian of Property executed a discharge of the charges of the land and delivered the same to the defendant.

" *The third issue.*—As I have answered the first issue in the affirmative, it is necessary to consider the third issue. The point in short is whether the Government of the Federation of Malaya is bound by the provisions of the Debtor and Creditor (Occupation Period) Ordinance, 1948. Section 55 of the Interpretation and General Clauses Ordinance No. 7 of 1948 provides that no Ordinance or Enactment shall in any manner whatsoever affect the rights of the Crown unless it is therein expressly provided. The word ' Crown ' is not defined in the Ordinance. Quite clearly it would include the Imperial Government and it is usually conceded that similar sections in the legislation of Crown Colonies exempts the local Government from the operation of the laws in like manner as the Imperial Government. The Federation of Malaya, however, is not a Crown Colony. The point apparently has never been decided in any Court in this country, but in my opinion the Government of the Federation of Malaya is bound by the provisions of any general Enactment of law effective in the Federation unless expressly exempted. I am strengthened in this view by the fact that in 1949 the legislature thought fit to amend the Control of Rent Ordinance, 1948, so as to exempt from the operations of the Ordinance premises which are the property of the Government of the Federation or the Government of any State or Settlement. Such an amendment would be unnecessary if it was clear that the Government of the Federation were not bound by the provisions of the Ordinance. I answer the third issue in the affirmative. . . ."

[Report : (1951) II M.L.R. 44.]

NOTE.—An appeal against the decision on the third agreed issue, in which the trial Judge had found for the respondents, was dismissed because, in the opinion of the Court of Appeal, the first agreed issue should have been answered in the negative. (Court of Appeal

Case No. 180 Contd. of the Federation of Malaya, Foster Sutton C.J., F. M., Brown Actg. C.J., and Abbott J., July 18, 1951: see (1951) II M.L.R. 154.)

Case No. 181 **Belligerent Occupation—Nature of—Occupation by a State of Its Own Territory Previously Occupied by the Enemy—Powers of United States Forces in the Philippines.**

TAN TUAN *ET AL.* *v.* LUCENA FOOD CONTROL BOARD.

Philippines, Supreme Court. October 6, 1949.

THE FACTS.—On June 14, 1945, the plaintiffs attempted to bring into Manila, for sale on the black market, three barrels of coconut oil and sixteen sacks of cassava flour, concealed in a truckload of firewood. Upon reaching the municipality of Lucena, the oil and flour were discovered and seized by the Lucena Food Control Board, a board of civilians appointed, with the approval of the United States Army Philippine Civil Affairs Unit, by the Mayor of Lucena, who was an appointee of the Civil Affairs Unit. The goods were then sold at the controlled price, and the proceeds were offered to the plaintiffs, who declined the payment. The plaintiffs sued for the " reasonable and actual value " of the confiscated goods. They contended that since the Province of Tayabas had been declared liberated before the seizure, the ordinary constitutional processes of government were automatically re-established and that the defendants thereby lost their powers. The Court of Appeals affirmed the decision of the Court of First Instance of Tayabas, rendering judgment for the plaintiffs.

On appeal,

Held: that the decision of the Court of Appeals must be affirmed. Military activities were continuing and civil administration had not yet been restored in the territory in question. The United States was therefore a belligerent Occupant of the area, which had been liberated from foreign invasion. The Court said:

" The liberation of the province without more did not terminate military control. Notwithstanding such liberation, and although as early as February 27, 1945, General MacArthur had declared ' the full powers and responsibilities under the Constitution restored to the Commonwealth', it is a fact that actually the province was still in a state of war on June 14, 1945. According to the findings of the Court of First Instance and the Court of Appeals, military operations in Tayabas on and after that date continued, except in Lucena and a few other municipalities. The civil authorities of the Commonwealth had not taken charge of the government in the province; the provincial governor and the mayors there were military appointees, and were acting in pursuance of military law and military directives.

" This phase of the case is controlled by the laws of war. The Rules of Land Warfare, published by order of the Secretary of War on October 1, 1940, and based on treaties and on practices of civilized nations, determined the time when military occupation might be considered at an end. Entitled 'Cessation of Occupation', section 280 of those Rules provides that the occupation ceases when ' the occupant evacuates the district or is driven out by the enemy, or by *levée en masse*, and the legitimate government actually resumes its functions '.

" The fact that this was not foreign territory did not deprive the United States Army of the status of belligerent occupant. Military government may be established not only in foreign territory occupied or invaded in time of war, but also domestic territory in a state of rebellion or civil war. (Chase C.J. in *Ex parte Milligan*, 4 Wall., 2, 141 ; 18 Law. ed., 281.) This right to establish government is not at all dependent upon the right of conquest, but is treated as an incident to the mere right of belligerent occupation. A nation can not conquer its own territory, but it may subdue and occupy such portions of it as are made the theater of an insurrection against its authority (*Hefferman* v. *Porter*, 96 Am. Dec., 459), or, for that matter, of foreign invasion. Also, the occupied territory may belong to a state allied to the occupant, and which willingly confides its domain to the protection of it. (3 Hyde International Law [1945] 1876, 1877.) "

The Court examined the authority of the Food Control Board to seize and sell the property and concluded that it had acted properly.

[Report : 47 Off. Gaz. 1739 (1951).]

Belligerent Occupation—Nature and Effects of—Members of Army of Occupation—Whether Subject to Their National Law.

See Case No. 57 (*Saelens* v. *M.P.*).

Belligerent Occupation—Nature and Effects of—Effect of Transfer of Administrative Control of Occupied Areas to Authorities of Occupied State.

See Case No. 193 (*Re Scarpato*).

ii.—Legislative, Judicial and Administrative Functions of the Occupant

Case No. 182 **Belligerent Occupation—Legislative Powers of Occupant—Article 43 of the Hague Regulations—Issuance of Currency by Belligerent Occupant—Relevance of Legality of the War—*Postliminium*—Recognition of Decrees of Occupant—Hague Regulations Governing Treatment of Prisoners of War—Recognition of Decrees of Occupant Enacted in Pursuance of Violation of Rules of International Law relating to Treatment of Prisoners of War.**

Aboitiz & Co. *v.* Price.

United States, District Court, Utah. June 16, 1951.

The Facts.—The defendant was a United States civilian captured by the Japanese forces in the course of their occupation of the Philippines. Imprisoned under harsh conditions, he attempted to ameliorate his situation with funds which the plaintiff, at considerable physical and financial risk, collaborated in smuggling to him. In return for sums of the currency issued by the Japanese authorities and lent by the plaintiff, the defendant signed promissory notes, bearing no interest and payable on demand in dollars, on which the plaintiff ultimately sued. The defendant contended that the notes were void for illegality, on the alternative grounds that they were executed in violation of Japanese edicts against traffic in money between internees and the outside world, and that, since the Japanese aggression and occupation were in violation of international law, the money issued pursuant to that occupation was illegal consideration for the notes.

Held: for the plaintiff. The Court said:

" First, defendant claims that the government of the Philippine Islands, under martial law, by the Japanese army of occupation, was a *de facto* government. And, he says there is an established principle of international law supporting the validity of the acts of a *de facto* government set up by a military conqueror. He urges that the sort of traffic in money between civilians outside and internees inside Japanese war prison camps as gave rise to these notes was forbidden under penalty of death by the *de facto* government. He contends that this proscription was valid, that it applies to these notes and renders them illegal where made, and he refers us to the principle of Conflict of Laws, that if a contract is illegal where made, it is usually invalid everywhere, and if valid where made, it is generally enforceable everywhere.

" Second, defendant claims that international and military tribunals sitting at the war crimes trials at Nurnberg and Tokyo held that acts of aggressive warfare in World War II were criminal and in violation of at least nine different treaties. Those tribunals hanged some men, and condemned others to prison who participated in those acts. Defendant argues that if the whole Japanese enterprise was as criminal as the tribunals at Nurnberg and Tokyo say it was, then the Japanese war money received by Price was an illegal consideration for the notes.

" Thus, it will be seen that defendant's contentions propose a dilemma to plaintiff. He claims the acts of the Japanese army of invasion and occupation either were legal or they were not. Either way, he says, defendant is entitled to win.

" The propositions of defendant's argument, however, do not exhaust the situation. Moreover, neither proposition is valid.

" This court concludes that the Japanese war notes were a legal medium of exchange. The Supreme Court of the Republic of the Philippines has so held.[1] To apply the general doctrine of the turpitude of consideration, as it affects the validity of contracts, to this currency would work the grossest injustice to millions of people in the Philippines, as the Supreme Court of the United States pointed out in the American Civil War cases. This currency, presumably, was used in the commonest transactions in the daily lives of the people for a period of over three years. It was used to make the simplest purchase in the market of daily food. It would be a cruel and oppressive judgment, attended by the greatest inconveniences imaginable, if all the transactions of the inhabitants of the Philippines, during the years of the Japanese occupation, were held tainted with illegality, because of the use of this currency.[2] Great inconvenience and disruption of most of the ordinary pursuits and business of society would have followed a failure to provide some medium of exchange. Moreover, in no sense could the use of the Japanese fiat currency in the transaction in question here be said to have been in aid of the invasion or occupation of the Philippines by the enemy Japanese. The issuance and use of this currency did not offend *ordre public*.

" And, this court concludes that no valid legal consequence can attach in this court to an enemy edict or regulation forbidding friends, under penalty of death to help a citizen of the United States survive cruel and barbarous imprisonment.[3]

---

[1] *Haw Pia* v. *China Banking Corporation*, G. R. No. L–554——Phil——, April 9, 1948.

[2] See [p. 605, n. 8] *infra*, Pillet, Les Lois actuelles de la guerre, and Spaight War Rights on Land, summarized by Feilchenfeld. And see *Thorington* v. *Smith*, 1868, 8 Wall 1, 19 L. Ed. 361, which held valid the currency issued by the Confederate States and used during the Civil War.

[3] [Footnote omitted.]

Case No. 182 *Contd.*

Any other view would discourage such assistance at a time when most desperately needed. It penalizes loyal and brave friends. It puts a premium upon enemy aggression, brutality, and barbarity. To hold valid the Japanese army regulation against this traffic in money and the death penalty imposed upon our people for its violation, is not only contrary to the public policy of this land, but is repugnant to our deepest convictions. . . .

" Paragraphs 5 and 6 of the stipulation set out above are the only evidence in the record of a Japanese Army edict forbidding such traffic in money. Defendant, however, contends that the death penalty imposed by the Japanese for helping American internees, gives rise to an implication that a prohibitory edict existed.[1] It may well be doubted whether the principle of his authorities applies to the instant case. But, even if it does, it avails defendant nothing, and for the purposes of this opinion we will assume that his position on this matter is correct, and that there was such an edict.

" Before discussing the applicable law, we must find what relationship the Japanese military authorities bore to Manila and surrounding territory. Was Japan a mere invader ? Or, on the other extreme, had she acquired sovereignty over the Island of Luzon ? It is submitted that neither is true. The relation was something more than invasion,[2] and much less than sovereignty.[3] The Japanese Imperial Army took possession and set up an administration of the territory. It appears as a fact from the evidence before me and from the history of which I may take judicial knowledge, that the Japanese Government, through its officers, exercised effective governmental control over Manila and neighboring territory, from early in January 1942 until early in February 1945. But, the war was not over, and the United States government had not recognized that government. I conclude, therefore, that the Japanese Imperial government was provisionally in effective control, exercising administration over, and therefore, in the international law sense, in belligerent military occupation of

---

[1] *Bartlett* v. *Venor*, Carth. 251 ; *Levinson* v. *Boas*, 150 Cal. 185, 88 P. 825, 12 L.R.A., N.S., 575 ; *McManus* v. *Fulton*, 85 Mont. 170, 278 P. 126, 67 A.L.R. 690 ; *Goldsmith* v. *Manufacturers Liability Insurance Co.*, 132 Md. 283, 103 A. 627.

[2] Oppenheim, International Law, Vol. II, sec. 167, defined belligerent occupation as, ' invasion *plus* taking possession of enemy country for the purpose of holding it, at any rate temporarily. The difference between mere invasion and occupation becomes apparent from the fact that an occupant sets up some kind of administration, whereas the mere invader does not.'

[3] Since the close of the 19th century, occupation alone does not transfer sovereignty. To do so requires cession by treaty of peace, abandonment in favor of the occupant, or extermination of the local sovereign and annexation of his realm. McNair, Legal Effects of War, 2d ed. pp. 319–320. Oppenheim, International Law, 6th Ed. Vol. II, pp. 337–338.

Present day International Law recognizes three stages in the process of conquest : (*a*) invasion ; (*b*) occupation ; and (*c*) transfer of sovereignty. McNair, pp. 310–320.

Manila and surrounding territory at the times important here.[1]

" Although it is correct to say that international law governs only the relations between States, and that it has nothing to do directly with disputes between private individuals, the principle has been clearly adopted in the United States that it is part of the law of the land, because either we have signed international agreements, or have otherwise written it into our municipal law. Oppenheim says :[2] ' Such customary International Law as is universally recognized or has at any rate received the assent of the United States, and further all international conventions ratified by the United States, are binding upon American courts, even if in conflict with previous American statutory law ; for, according to the practice of the United States, customary as well as conventional International Law overrule previous Munciipal Law,' provided, apparently, that they do not conflict with the Constitution of the United States.

" In this opinion, it is necessary to consider portions of the Law of Nations in their municipal aspects. In passing it may not be out of the way to observe that recognition in the municipal law of international law principles is desirable, for it may hasten the day when trial by battle between nations will be just as obsolete as it has become in the English Common Law.

" Counsel for defendant refers to the Japanese military government of the Philippines as a '*de facto*' government. This is an ambiguous term.[3] The situations in reference to which it has been used run the whole gamut from a government virtually the sovereign, although not yet *de jure*, down to belligerent invasion. Sometimes the term refers to recognition *de facto* and not *de jure* by the political departments of the recognizing power, *e.g.* the British Foreign Office, or our own State Department. McNair[4] and Oppenheim[5] say it is difficult to find any distinction between recognition *de facto* and *de jure* so far as the legal effects applied by courts are concerned.

" Hence, in this opinion we use the term ' belligerent occupation ' which is clearer and more accurate.

" McNair[6] says this distinction between *de facto* and *de jure* ' should not be allowed to obscure the stage of belligerent occupation and to attach to that status the rights and duties appertaining to conquest recognized as a *de facto* situation. Belligerent occupation creates a well established status which has been equipped by International Law with rights and duties

---

[1] Art. 42, Hague Regulations, 36 Stats., part 2, p. 2306.

[2] International Law, 6th Ed., Vol. II, sec. 101 ; ibid., 7th Ed. (1948) Vol. I, secs. 20, 21*a* (2), note 3, where United States Supreme Court cases are cited. Also, see Stone, Law and Its Administration, (1915), pp. 84–85.

[3] *Thorington* v. *Smith*, 1868, 8 Wall. 1, 19 L. Ed. 361.

[4] McNair, Legal Effects of War, pp. 353–354.

[5] Oppenheim, 7th ed., Vol. I, p. 131.

[6] McNair, Legal Effects of War, p. 354.

Case No. 182 *Contd.*

in the interests of order and the welfare of the inhabitants of the occupied territory.'[1]

" The relation of belligerent occupation is fully recognized by international law, and by a body of municipal law which has evolved through judicial decision in many countries, including our own.[2]

" An enemy conqueror is not a very likely person in whom to repose the trust of administering the occupied territory. He is on the ground, however, and has the power to enforce his commands. And dangerous as it may be to recognize any authority in him, it is better to encourage some proper government than none at all. Without some kind of order, the whole social and economic life of the community would be paralysed. So, international law has recognized the right of the occupant to make regulations for the protection of his military interests and the exercise of police powers. However, such law also imposes upon the occupant the duty to maintain public order and to provide for the preservation of the rights of the inhabitants.

" The emphasis is upon public order and safety, and the welfare of the inhabitants.

" This is recognized by Article 43 of the ' Hague Regulations '. These are the Annex to the 1907 Hague Convention IV, respecting the Laws and Customs of War on Land, Articles 42–56, entitled ' Military Authority over the Territory of the Hostile State '.[3] Both the United States and Japan signed and ratified this international agreement, which declares the governing international law principle : that the commander of a force occupying enemy territory ' shall take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country '.

" Between 1918 and 1935, the validity and applicability of Articles 42–56 (of the Hague Regulations) were confirmed in a great number of decisions of international and domestic tribunals ; they were never contested by any party to any dispute nor were they questioned by any government.[4]

" And, our recognition of our own responsibilities is found in the United States Army Basic Field Manual, Rules of Land Warfare, and Basic Field Manual Military Government, prepared under the direction of the Judge Advocate General,[5] which instructs our occupation forces: 'Military government should be just, humane, and as mild as practicable, and the welfare of the people governed should always be the aim of every person engaged therein. As military government is executed by force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor and humanity—virtues adorning a soldier even more than other men for the very reason that he possesses the power of his arms against the unarmed. Not only religion and the honor of the Army of the United States require this course, but also policy.'

---

[1] See also McNair, Legal Effects of War, pp. 340–343, and p. 320. Also, Oppenheim, International Law, 7th Ed., Vol. I, secs. 74 to 75*g* inclusive.

[2] For monographs and articles, as well as the leading textbooks, see Ernst H. Feilchenfeld, The International Economic Law of Belligerent Occupation, (1942), Monograph No. 6, Carnegie Endowment for International Peace, Division of International Law, pars. 5, 40, 245–247, and page 155.

[3] 36 Stats., part 2, p. 2295, 2306. Note that the Regulations speak of ' authority ', not of sovereignty.

[4] Feilchenfeld, *supra*, sec. 13, p. 5.

[5] FM 27–10, Ch. 10, and FM 27–5, Government Printing Office, Washington, D.C., 1940.

"Hyde [1] says, 'The occupant enjoys the right and is burdened with the duty to take all the measures within his power to restore and insure public order and safety.'

"The leading writers all agree. Sir Arnold Duncan McNair, in his extremely helpful book,[2] says, 'the principle is that the occupant being under a duty to maintain order and to provide for the preservation of the rights of the inhabitants and having a right recognized by international law to impose such regulations and make such changes as may be necessary to secure the safety of his forces and the realization of the legitimate purpose of his occupation, his acts, whether legislative, executive, or judicial, so long as he does not overstep these limits will be recognized by the British Government and by British Courts of law—during and after the war if Great Britain is neutral, after it if Great Britain is belligerent'.

"The British author, W. E. Hall, says [3] of postliminium, 'Thus judicial acts done under (the control of the occupant), when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of municipal law, remain good. Were it otherwise, the whole social life of a community would be paralysed by an invasion (that is, occupation); and as between the state and individuals the evil would be scarcely less, . . . it would be hard for example that payment of taxes made under duress should be ignored, and it would be contrary to the general interest that sentences passed upon criminals should be annulled by the disappearance of the intrusive government.'

"Oppenheim in his chapter on postliminium, says [4] 'if the occupant has collected the ordinary taxes, has sold the ordinary fruits of immoveable property, has disposed of such moveable State property as he was competent to appropriate, or has performed other acts in conformity with the laws of war, this may not be ignored by the legitimate sovereign after he has

---

[1] Hyde, International Law, (ed. rev. ed., 1945) Vol. III, p. 1882, sec. 690.

[2] Legal Effects of War, 2nd ed., (1944), p. 337. See also [p. 596, n. 1] above.

[3] International Law (8th ed.) p. 579, quoted pp. 337–338 of McNair.

[4] International Law, Vol. II, sec. 282, quoted p. 338 of McNair.

Case No. 182 *Contd.*

again taken possession of the territory. However, this only extends to acts done by or under the authority of the occupant *during the occupation.*'

" And, McNair [1] sums up : ' Thus we apprehend that if the enemy were to occupy the Scilly Isles (English territory) . . . all the ordinary transactions of private law taking place in accordance with existing English law during the enemy administration, such as contracts, dispositions of moveables and immoveables, devolution of property by will or upon intestacy, and all normal official transactions such as the collection of ordinary taxes, would, at the end of the occupation, be treated as valid, and all judgments, civil and criminal, given in accordance with English law or with such regulations as the enemy was lawfully entitled to prescribe, would be respected. But if the enemy were to introduce a new system of landholding, for instance, to divide up an estate amongst the tenants and purport to make them freeholders, or a new system of local government, or a new marriage law, or were to disestablish and disendow the Church of England, such measures would not be respected.'

" In the footnote to this passage, the author says : ' In regard to convictions for offences, it seems necessary to exclude from this statement any unexpired result of convictions for offences against the security of the occupant and his troops and any political offences directed against him. But I can see no reason why a conviction for an offence against a rationing system or against a prohibition of profiteering imposed by the occupant in the interest of the community as a whole should not in principle continue to have effect after the end of the occupation. The Peace Treaty may, of course, expressly deal with this matter.'

" We need not here determine the precise scope of the authority permitted the occupant by international law. There are but two questions for determination :

" First, shall a United States Court recognize as a valid medium of exchange the Japanese army pass-money received for the notes in question ?

" Second, shall a United States Court, long after the war is won, recognize as valid the Japanese army edict forbidding traffic, under penalty of death, in that money between internees and their friends outside the war prison camp ?

" The international law principle to be applied in the determination of these questions is simple : Were the Japanese decrees or regulations limited to the necessity of preserving the peace, order and good government of the Philippines ?

" Anything else was outside and beyond the authority conferred by international law.[2] And, I am not unmindful of the suggestion of writers upon international law that, in addition, the belligerent occupant has the right to make such regulations 'as may be necessary to secure the safety of his forces and the realization of the legitimate purpose of his occupation'.

---

[1] Legal Effects of War, pp. 338–339.

[2] *Ochoa* v. *Hernández y Morales*, 230 U.S. 139, 33 S.Ct. 1033, 57 L. Ed. 1427 (where the Supreme Court held that a major-general of the U.S. Military

"The Japanese occupation was an act of unprovoked aggression. It was an international crime. It was outside and in violation of international law.

"Japan and the United States agreed in the 1907 Hague Convention I for the Pacific Settlement of International Disputes: '. . . before an appeal to arms . . . to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly powers'.[1]

"And, Japan, as well as the United States, signed and ratified the 1907 Hague Convention III, relative to the opening of hostilities,[2] which contains the specific language: 'The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.'

"We all remember the sneaking and deceitful tactics of Japan's diplomats, Kurusu and Nomura, on the eve of the surprise attack on Pearl Harbor, tactics which the record in the Nürnberg trials shows had Hitler's approval and commendation.[3] The occupation of the Philippines was in violation of at least these two provisions, and, from our point of view, that occupation could have no legitimate purposes which Japan was entitled to realize.[4]

"The International Military Tribunal at Nürnberg says[5] in its judgment: 'The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world.

"To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other crimes in that it contains within itself the accumulated evil of the whole.'

"Were it necessary (which it is not) in the present case to depart from established rules of international law, it would be

---

forces, in occupation and control of Porto Rico as a colony of Spain, bound by the principles of international law to do whatever was necessary to secure public safety, social order, and the guaranties of private property, had overstepped those limits).

[1] Part II, Art. 2, 36 Stats. part 2, p. 2212.

[2] Art. 1, 36 Stats. part 2, p. 2271.

[3] 6 F.R.D. 105.

[4] Although not strictly relevant, the cases of *In re Yamashita*, 1945, 327 U.S. 1, 66 S.Ct. 340, 90 L. Ed. 499, and *Johnson* v. *Eisentrager*, 1949, 339 U.S. 763, 70 S.Ct. 936, 94 L. Ed. 1255, are of interest.

[5] 6 F.R.D. 73, 86.

Case No. 182 *Contd.* legitimate to do so, for as Feilchenfeld says,[1] 'The law of occupation shared and still shares with other parts of international law its most general and fatal weakness ; there may be legitimate deviations from the rules if the other side violates international law. So long as there are no wartime tribunals of an international kind, it is in practice left to every state to decide whether it wants to assert that the other side has engaged in violations.'

" Tested by the principle that a belligerent occupant's decrees or regulations must be in the interest of the welfare of the inhabitants to be entitled to recognition by this court, the Japanese fiat currency was valid, but the prohibition of traffic between the internees and their friends was not.

" Some recognized medium of exchange was necessary to keep the economic life of the community going. And, the power of a military government in occupied enemy territory to issue military currency cannot seriously be questioned.

" Feilchenfeld, in his valuable study,[2] says that such power is based upon the occupant's general power to maintain law and order recognized in Article 43 of the Hague Regulations. According to Feilchenfeld [3] the occupant may exercise that power in at least one of three ways : (1) When the local currency is inadequate, as, for example in the Balkan countries during the war of 1914–1918, and, again, in Belgium when the Belgian government in 1914, removed the metal coverage of the national currency to London, and ' the local currency continues to be used, an occupant may reorganize the national currency by appropriate methods, such as the creation of new types and supplies of coverage '. (2) An occupant may use his own currency in the occupied region. (3) When the local currency is inadequate, and the occupant is afraid to expose his own currency to the additional strain, the occupant may create new types of money.

" Of the latter the Supreme Court of the Republic of the Philippines says : [4] ' This last method was the one adopted by Japan in this country, because the coverage of the Philippine Treasury Certificate of the territory occupied had become inadequate, for most if not all the said coverage have been taken to the United States and many millions of silver pesos were buried or thrown into the sea near Corregidor, and Japan did not want to use her national currency, and expose it to additional strains.'

" The United States Supreme Court recognized the principle of the validity of such currency in *Thorington* v. *Smith.*[1] A promissory note, for the balance of the purchase price of Alabama land, made in 1864 between residents of Alabama payable in Confederate money was held enforceable in the United States courts after the war. During the Civil War the Confederacy issued its own currency which was used both in the South and in those portions of the North occupied by the Confederate army from time to time. In respect to the Confederate notes the Supreme Court said : ' While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistible force.

---

[1] *The International Economic Law of Belligerent Occupation*, Monograph No. 6 of the Division of International Law, Carnegie Endowment for International Peace, par. 271 (1942).

[2] *Id.* par. 272, 285, 296.

[3] *Supra*, p. 21, note 3.

[4] *Haw Pia* v. *China Banking Corporation*, G. R. No. L–554——Phil—— April 9, 1948.

" ' It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency, cannot be regarded for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation.'

" In 1948 this very same Japanese military fiat currency was held a valid medium of exchange by the Supreme Court of the Republic of the Philippines in *Haw Pia* v. *China Banking Corporation.*[2] Before the Japanese invasion a man had borrowed money from the China Bank and mortgaged his land for security. After the invasion, the Japanese took over the China Bank and appointed the Bank of Taiwan, Ltd. as liquidator. During the Japanese occupation, the mortgagor paid his debt in Japanese military fiat currency to the Bank of Taiwan. After the Philippines were recaptured by the American forces the China Banking Corporation called upon the mortgagor for payment claiming (1) the Japanese fiat money was not a valid medium of exchange, and (2) the Bank of Taiwan, liquidator, was not a

---

[1] 8 Wall. 11, 19 L. Ed. 361, distinguished in *Hanauer* v. *Woodruff*, 1872, 15 Wall. 439, 21 L. Ed. 224. *Thorington* v. *Smith* was approved in *Delmas* v. *Merchants' Insurance Co.*, 14 Wall. 661, 665, 20 L. Ed. 757 ; *Planter's Bank* v. *Union Bank*, 16 Wall. 483, 499, 21 L. Ed. 473 ; *Confederate Note* case, 19 Wall. 548, 555–557, 22 L. Ed. 196.

[2] *Supra.*

Case No. 182 *Contd.*

proper party to whom to make payment. Both contentions were rejected by the court, and the debt and mortgage were declared satisfied and discharged.

" The decision in *Haw Pia* v. *China Banking Corporation* was followed by the Supreme Court of the Philippines in *Hongkong and Shanghai Banking Corporation* v. *Luís Pérez Samanillo, Inc., and Register of Deeds of Manila.*[1] The Bank of Taiwan, Ltd., was appointed by the Japanese Army of occupation as liquidator of the Hongkong and Shanghai Banking Corporation. Before the invasion, the latter Bank had extended credit to the defendant Samanillo, Inc. secured by mortgage on lands. On the date of the Japanese invasion January 1, 1942, the amount owing was nearly one and one-half million pesos. During the occupation the debtor paid the amount of the debt in Japanese war notes to the Bank of Taiwan, Ltd., and received from the latter a cancellation and discharge of the mortgage. In an action to recover the debt and to annul the deed of cancellation of the mortgage, the court held the payment was valid and released the defendant from his obligation to the plaintiff Hongkong and Shanghai Bank.

" The Hague Regulations respecting the laws and customs of war on land annexed to Hague Convention IV of 1907, signed and ratified by both Japan and the United States, were intended to serve as a general rule of conduct for the belligerents in their relations to the inhabitants. It was not found possible to cover specifically in the Regulations all the circumstances which might arise in practice. On the other hand, it was ' clearly ' not intended to leave the unforeseen cases to the arbitrary judgment of military commanders. Hence, the High Contracting parties agreed that :

" ' Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.' [2]

" This provision, and Article 43, which requires the occupant to '. . . take all the measures in his power to restore, and ensure, as far as possible, public order and safety . . .',[3] are ample recognition by this country of the power of the occupant to issue war currency. The validity of such war currency is not only supported by these principles of international law, to which our own country has given its assent, but, it is supported by the dictates of a sound public policy, and, there is back of it a long history of the use of war money by many nations.

---

[1] G. R. No. L–1345, —— Phil. —— Nov. 10, 1948. See also *Philippine Trust Company* v. *Luis Ma. Araneta, et al.*, G. R. No. L–2734, —— Phil. ——, —— March 17, 1949 ; *Christóbal Rono* v. *José L. Gómez*, G. R. No. L–1927, —— Phil. ——, May 31, 1949.

[2] 36 Stats., Part 2, p. 2279–80.

[3] 36 Stats., Part 2, p. 2306.

" During our own Revolutionary War, the Continental Congress issued currency for use in British territory occupied by the colonial troops before the Declaration of Independence.[1] The rebel government of the Confederate States issued a war currency which, as we have seen, was held valid by the Supreme Court of the United States.

" Moreover, the United States and her allies in World War II issued occupation currency in Sicily, Germany, and Austria. The Combined Chief of Staffs of the Supreme Allied Commander issued a directive June 24, 1943, that the task forces use, besides regular United States coins, yellow seal dollars and besides regular British coins, British Military Authority (BMA) notes, to supplement lire currency.[2] The Combined Directive for Military Government in Germany, April 28, 1944, directed the Allied forces to use yellow seal dollars and British Military Authority notes (BMA), if the Reichs mark currency became inadequate.[3] The American Directive on Military Government of Austria, June 27, 1945, ordered our forces to use for military purposes only Allied Military Schillings.[4]

" The United States Army and Navy Manual of Military Government and Civil Affairs,[5] instructs theatre commanders of United States forces as follows :

" ' Functions of Civil Affairs Officers.—In the occupation of such territories for a considerable period of time, the civil affairs officers will in most cases be concerned with the following and other activities :

" ' 1. Money and banking.—Closing, if necessary and guarding of banks, bank funds, safe deposit boxes, securities and records ; providing interim banking and credit needs ; liquidation ; reorganization, and reopening of banks at appropriate times ; regulation and supervision of credit cooperatives and other financial agencies and organizations ; *execution of policies on currency fixed by higher authority, such as the designation of types of currency to be used and rates of exchange supervision of the issue and use of all types of money and credit* ; declaration of debt moratoria ; prevention of financial transactions with enemy occupied territory.'

" Germany used occupation currencies on a large scale in World War II, the most widely used being the Reichskreditkasse mark. The British issued currency during the occupation of Archangel in World War I.[6] And the British, during the Boer

---

[1] Dewey, Financial History of the United States, 37–38.

[2] Hajo Holborn, American Military Government, 1947, pp. 115, 116.

[3] *Id.* p. 140.

[4] *Id.* p. 192.

[5] F.M. 2710 OPNAV 50–E–3, paragraph 12.

[6] White, Currency of the Great War, 66 ; League of Nations, Currency After the War, 100.

Case No. 182 *Contd.*

War, issued negotiable receipts for goods, similar to currency.[1]

" During the Russo-Japanese War, Japan issued occupation currency in Korea and Manchuria.[2]

" The French printed Reichsbank notes during the occupation of the Ruhr in 1923.[3]

" In the majority opinion in *Haw Pia* v. *China Banking Corporation*, Justice Feria also points out the interesting fact that, at least as early as the year 1122, during the siege of Tyre. Doge Micheli issued leather money which he promised to redeem upon his return to Venice.[4] And that Frederick II, at the siege of Milan, also used leather money.

" It would seem to be clear that the power of a military occupant to issue a fiat currency for use in occupied territory is fully established and recognized by the United States, as well as in international law, and history, and practice.

" Recognition of the relation of belligerent occupation does not rest alone upon international law. The municipal law of the United States, England and other countries give it full status and recognition.[5] . . .

" The acts of the belligerent occupant are valid which benefit and protect the inhabitants. And, so too are his acts which provide against the unnecessarily severe derangement of the ordinary pursuits and business of society.

" On the other hand, those acts of the belligerent occupant are not valid which are directed by the enemy against this nation or its citizens, are obnoxious to our ideas, and are intended primarily to aid his efforts to put us down. The acts of the occupant must not offend *ordre public*.

" No principle, either of international or municipal law, requires a United States court to hold otherwise. From an international law point of view this court may hold the Japanese decree against this traffic in money inoperative upon any one of three possible grounds :

" First, we are free under international law to choose our own theories of conflict of laws, and, that is particularly true, where the acts to which we refuse recognition are the acts of an enemy. Even neutral sovereign states enjoy considerable latitude in the solution of their own conflict-in-law problems according to their own choice of theories. *A fortiori*, that is true of a sovereign which is an ally of the occupied state, and which had as close a relationship to the Philippines as we had in 1942, in a war against the common enemy. It must be remembered that in this decision we are required to go back into war-time relationships.

---

[1] Spaight, War Rights on Land, 396.

[2] Takahasin, International Law in the Russo-Japanese War, (1908) 260–261 ; Ariga, La Guerre russo-japonaise (1908), 450 *et seq*.

[3] Nussbaum, Money in the Law, 158–159, Note 6.

[4] Del Mar, Money and Civilization, 26 and 33.

[5] McNair, Legal Effects of War (1944), Chapter 17.

" Feilchenfeld, in his analysis and summary of the international law of belligerent occupation says, the occupied state ' may certainly go as far as it pleases in refusing recognition to acts of its enemy. . . . the degree of benevolence exercised by a sovereign toward its own people, is according to present rules of international law, a domestic and not an international matter.' (sec. 460) ' Rescission measures of returning sovereigns', Feilchenfeld says, ' will be bound to involve inhabitants more frequently and more directly than they will involve the former occupant. Going to extremes in such a policy will invariably do more harm to the sovereign's own population than to the enemy. This aspect frequently has been stressed by the greatest and soundest authorities on the law of occupation Where, as is true in the majority of cases, relationships between the sovereign's own subjects are concerned, only problems of domestic law will be raised.'

" This is true whether the question under consideration is : the extra-territorial effect of occupation measures in an unoccupied area,[1] or the effects of measures of absent sovereigns in the occupied area,[2] or, the recognition of occupation measures by third states,[3] or, to what extent neutral countries will recognize laws of absentee sovereigns for regions which they do not control,[4] or, non-recognition by an ally of the occupied state,[5] or, the far-reaching rescinding power of a returning sovereign.[6]

" Problems of *postliminii* are governed by ordinary municipal law, *droit commun*, according to Niboyet.[7]

" Second, the Japanese regulation in question was *ultra vires*, because the power to make it cannot be found in, or deduced from, the Hague Regulations, and they are the measure of international legality.

" ' In regard to occupation decrees issued under general police powers, decisions rendered by occupation tribunals, or other authorities and relationships created or modified between private individuals,' Feilchenfeld says, ' there has been a sound and strong tendency to distinguish between " permitted " acts and acts not meeting the requirements of international legality. The former will normally be upheld, while the latter will be refused recognition.' [8]

---

[1] Feilchenfeld, *supra*, secs. 457–460, 460.

[2] *Id.*, secs. 461–472, 466.

[3] *Id.*, secs. 475–480, 476–477.

[4] *Id.*, secs. 481–484, 482–483.

[5] *Id.*, secs. 486–487.

[6] *id.*, secs. 490–502, 496, 497, 502.

[7] ' De l'effet en pays neutre des mesures de guerre telles que séquestres,' etc. *Revue de droit international privé et de droit pénal international*, Vol. XVI (1920), pp. 248–257.

[8] *Supra*, sec. 496. In section 497, Feilchenfeld refers to the ' wise advice ' of Pillet, Les Lois actuelles de la guerre, 2nd ed. pp. 255–256, and Spaight, War Rights on Land, pp. 366–367 : ' Leading English and French writers before 1914 were opposed to the application of postliminy to permitted

Case No. 182 ***Contd.***

“ It is believed that we should not recognize occupation measures of the hostile kind involved in this case, and that the distinction we have attempted to spell out is the dominant distinction in the decisions and practice.

“ During the War of 1914–1918, Belgium was subjected to a regulated economy through German occupation decrees governing a detailed variety of subjects. The Belgian courts, after the war, furnish us with instances of both recognition and non-recognition of the German occupant's decrees, which further illustrate the distinction. The courts upheld the German regulations aimed at ensuring a supply and reducing the prices of commodities,[1] but held invalid those German occupation regulations which were beyond the scope of authority conferred by the Hague Regulations, because not supported by either military necessity or the necessity of maintaining public order. For example, in *Bochart* v. *Committee of Supplies of Corneux*, the Court of Appeal of Liège upheld a German decree regulating and trying to reduce the exorbitant price of vegetables. And, in *City of Malines* v. *Société Centrale pour l'Exploitation du Gaz*, the Court of Appeal of Brussels upheld a German decree increasing the cost of supplying gas, holding that ‘ the circumstances of war time, and particularly the

---

acts of occupants. Pillet believes that the laws, decrees, and law court decisions of an occupant should be regarded as good and valid by the returning sovereign. According to Pillet, social life would be paralysed if people knew that the end of hostilities would mean a fatal dissolution of all results of the occupation, and it is in the interest of the “ unfortunate ” populations that a returning sovereign should refrain from upsetting all measures taken by an occupant. Spaight follows a similar line and points out that no one would enter into any legal relations during an occupation if such legal relations were to be nullified the moment the occupation ceased, and that such nullification would be unjust to the individual inhabitants and “ impolitic as regards the community at large ”. However, Spaight applies his theory only to lawful measures of an occupant, not to illegal measures and excesses of jurisdiction : “ If the legal government were obliged to recognize the continuing effects of any act of administration carried out under an occupant's authority, a few weeks' occupation might possibly result in servitudes being set up or obligations undertaken, which would prejudice the legal government for a generation.” Spaight also points out that certainly the returning sovereign is not called upon to recognize purely political acts of the occupant or judicial sentences inflicted for such military offenses as war treason.” But subject to these limitations, Spaight is in agreement with Pillet that the acts of an occupant “ are entitled to respect and the fact that they are acts done by an enemy does not impair their validity ”.

“ [1] (Court of Appeal of Brussels) *City of Malines* v. *Société Centrale pour l'Exploitation du Gaz, Annual Digest*, 1925–1926, Case No. 362 ; (Court of Appeal of Liège) *Bochart* v. *Committee of Supplies of Corneux, Annual Digest*, 1919–1922, Case No. 327 ; (District Court of Rotterdam) *Cillekens* v. *De Haas, Annual Digest*, 1919–1922, Case No. 336.

“ [2] (German-Belgian Mixed Arbitral Tribunal) *City of Antwerp* v. *Germany, Annual Digest*, 1925–1926, Case No. 361 ; (Belgian Court of Cassation) *Commune of Grâce-Berleur* v. *Colliery of Gosson Lagasse, Annual Digest*, 1919–1922, Case No. 326 ; (Court of Appeal of Liège) *Mathot* v. *Longué, Annual Digest*, 1919–1922, Case No. 329 ; (Court of Appeal of Brussels) *De Brabant and Gosselin* v. *T. and A. Florant, Annual Digest*, 1919–1922, Case No. 328. See McNair, pp. 321–322, Oppenheim, 6th ed. Vol. II, pp. 341–43, sec. 169, note 5, and Feilchenfeld, *supra*, secs. 498–499, and notes.

increase in the cost of raw materials and the necessity for providing for the needs of the population, in fact justified the measures taken by the occupying authorities '.

" On the other hand, the Court of Appeal of Brussels, in *De Brabant and Gosselin* v. *T. and A. Florant*, refused to uphold a German order because it had been issued in order to starve the population and had gone beyond Article 43, and could not void an agreement properly concluded by the parties. And, similarly, in *City of Antwerp* v. *Germany*, the court refused to give effect to a decree of the German governor-general of Antwerp affecting the responsibility of municipalities for acts of violence by mobs against persons and property.

" By the use of these illustrations we do not mean to be understood as adopting the extreme Belgian school,[1] for these illustrations do not fall within it.

" In all of the cases dealing with the extra-territorial effect of enemy property legislation it is held that such legislation can have no extra-territorial effects. These decisions also support the distinction we make for they are based upon the hostile and spoliatory character of the measures.

" Third, we may refuse recognition to all measures taken by Japan in violation of the rules of international law. The notes in question and the traffic in money out of which they arose were the direct, if not inevitable result of the starvation and ill-treatment of our people who were Japanese prisoners of war.

" At the very least the Japanese army violated Articles 4 and 7 of the Hague Regulations, 36 Stats. Part 2, pp. 2296–97 in their treatment of these prisoners, and violated the corresponding improved and elaborated provisions, Articles 2, 4, and 11, (47 Stats. Part 2, pp. 2031 and 2034) of the Geneva Convention of July 27, 1929, Relative to the Treatment of Prisoners of War. Prisoners of war ' must at all times be humanely treated and protected against acts of violence . . .'. The detaining power ' is bound to provide for their (prisoners') maintenance '. ' The food ration of prisoners of war shall be equal in quantity and quality to that of troops at base camps ' ; and ' prisoners shall receive facilities for preparing, themselves, additional food which they might have '.

" The edict in question was an implementation of the policy, and a further attempt on the part of the Japanese, to starve and torture our people in an intolerable and internationally illegal manner. . . ."

[Report : 99 F. Supp. 602]

NOTE.—The decision is noted in *Harvard Law Review*, 65 (1952), p. 527.

---

[1] Feilchenfeld, *supra*, pp. 134, 136 ff., 142, and 147 ff.

Case No. 183 **Belligerent Occupation—Legislative, Judicial and Administrative Functions of Occupant—German Annexation of Alsace-Lorraine—Establishment of German Courts—Validity of Decisions of.**

Z. *v.* K.

France, Court of Appeal of Colmar. June 12, 1951.

The Facts.—This was an action for affiliation. The respondent had, in February 1948, given birth to a child of which the appellant was alleged to be the father. A preliminary question which fell to be determined by the Court was whether the child was simply born out of wedlock or whether it was the child of an adulterous union. The respondent had in 1942 obtained a divorce from the Landgericht of Strasbourg set up by the German authorities of occupation as an incident of the " annexation " of Alsace-Lorraine. By virtue of an Ordinance of September 15, 1944, judgments given by courts so set up did not automatically receive an exequatur in France, in view of the fact that they were considered to be illegally constituted, but could receive—or be denied—the exequatur after examination of the case by a French tribunal. The divorce decree obtained by the respondent received the exequatur in December 1947. It was now contended on behalf of the appellant that the marriage of the respondent had not been validly dissolved until the date when the divorce decree obtained the exequatur of the French court, and that, since the child had been conceived before that date, it must be considered to have been born of an adulterous union.

Held: that the child was not born of an adulterous union. The decree of divorce pronounced in 1942, while not perfect in law, in fact brought the marriage to an end. The Court said:

" Judgments rendered, as a result of the *de facto* annexation of the departments of the Rhine and Moselle, by illegally constituted tribunals which in violation of international law applied German law even to questions of civil status, cannot receive the exequatur provided for in respect of decisions of foreign courts which require to be applied in France. At the same time, it was necessary to give these illegal decisions a legal existence conforming to French public policy, in order to protect the legitimate interests of individuals; for this purpose the Ordinance of September 15, 1944, established the procedures of exequatur and review. However, these procedures of regularisation and supervision do not completely set aside the legal situations created by the *de facto* judicial authorities. Thus it cannot be said that the divorce decree of August 5, 1942, which became final both in the relationship between the parties and with regard to third parties, did not have any effect during the occupation. . . . Admittedly, without exequatur or review the divorce was not perfect in the eyes of French legislation. Nevertheless, both between the parties and with regard to third parties the effects of marriage were thereby brought to an end in fact and even in law. The exequatur cannot, by a legal fiction, extend these effects beyond the date when the German divorce judgment became final. Moreover, even the refusal of the exequatur, which would prevent the divorce from becoming perfect, could not retroactively bring into being the duty of cohabitation and other effects of marriage."

[Report: *Revue critique de Droit international privé*, 41 (1952), p. 131.]

NOTE.—See, to the same effect, *Bour* v. *Bour*, decided by the Cour de Cassation on January 9, 1951 (*ibid.*, 40 (1951), p. 313).

Belligerent Occupation—Legislative Powers of Occupant—Enforceability after Liberation of Occupation Ordinance Contrary to International Law—Scope and Effect of Legislation of Government of Liberated Territory concerning Validity of Occupation Ordinances. **Case No. 184**

VAKGROEP BEGRAFENISWEZEN *v.* H.M.C.T.

Holland, District Court of The Hague. October 5, 1949.

Court of Appeal, The Hague. April 5, 1951.

THE FACTS.—During the German occupation of Holland the occupation authorities, by an Ordinance dated October 31, 1940 (*Verordnungsblatt* No. 206/1940), sought to organize compulsorily the business and industry of the country, in such a way as to enable them to control the economic and social life of the country and gradually to " Nazify " it. This Ordinance was provisionally maintained in force by the Netherlands Government (Decree of September 17, 1944: *Staatsblad* No. E 93). After the liberation, a section of the organization thus set up endeavoured to collect from its members arrears of contributions which they had refused to pay to the organization during the occupation.

Held (by the District Court): that the action to enforce payment of arrears of contributions must fail. The Occupation Ordinance was contrary to international law and could not, therefore, be enforced by a Dutch court retroactively in respect of the occupation period. The Ordinance was enacted by the Secretary-General of the Dutch ministerial department concerned and therefore had " the force of law ", but nevertheless it was not a " law " in the sense of the Netherlands Constitution

Case No. 184 *Contd.*

and was therefore not "inviolable".[1] In consequence, it was subject to the inherent power of the judiciary to test it by superior rules of law. It made no difference that Royal Decree No. E 93 had provisionally maintained the Ordinance in force. Neither the revoking of an Occupation ordinance under Article 17 of the Decree, nor its provisional maintenance in force (under Article 18), implied either that the ordinance concerned had been or that it had not been validly enacted. That question was, in fact, completely irrelevant, since the validity or otherwise of the origin of an ordinance was not taken into account when it was revoked or maintained in force, as the case might be, after the liberation, because a possible *vitium originis* was cured by the Decree for the present and the future. If the Decree had been intended to provide a criterion for the original validity or invalidity of Occupation ordinances, it would have encroached upon an elementary principle of Netherlands law recognized, *inter alia*, by Article 4 of the Law Fixing General Principles for the Legislation of the Kingdom, 1826, because such a thing would have meant giving retroactive effect to the Decree, and that would be possible only if the text contained an unambiguous provision in that sense. This was by no means the case, however; on the contrary, the text of the Decree of 1944 was, rather, opposed to the idea of retroactive effect. For example, even in respect of those Occupation ordinances which, being contrary to the law of nations, could not be recognized by any Government and which, therefore, offered an excellent opportunity for an express declaration on the illegality of their origin, the Decree had confined itself to stating (in Article 16) that they must be deemed never to have been in force. This expression was not equivalent to proclaiming their nullity *ex origine*; it was simply meant to serve as a preamble to a regulation of the effects which they might have produced in the meantime (as was clear from Article 30). At all events, it nowhere appeared that the Royal Decree had been intended to deprive the courts of their inherent right to test certain rules of law by other, superior, rules. This inherent right of the judiciary to test the validity of rules of law was not concerned *in casu* with the Constitution or an Act of Parliament, since the Secretaries-General in occupied Holland were acting in an emergency, but rather with the question whether, in so doing, those Secretaries-General had or had not exceeded their powers. The limits of those powers were determined by the task which had fallen to their lot, viz., of doing what was necessary in order to maintain the life and well-being of the civil population within the existing constitutional framework, a task which in fact ran parallel with the task entrusted to them by the Occupant in the exercise of his powers under Article 43 of the Hague Regulations of 1907.

---

[1] The courts of the Netherlands are not competent to examine a "law" (Act of Parliament) for the purpose of determining whether it is compatible with the Constitution.

On appeal,

Held (by the Court of Appeal): that the Occupation Ordinance of 1940 was enforceable. The courts had no right to test the validity during the occupation period of Occupation ordinances. Royal Decree No. E 93 had declared Ordinance No. 206/1940, together with all its executive regulations, to have had binding force during the occupation period, and that was conclusive.

[Report: *N.J.*, 1952, No. 468.]

NOTE.—This case reflects the unresolved controversy concerning the *a posteriori* validity or invalidity of Occupation ordinances, which also divided the Supreme Court and the Special Court of Cassation. For an exposition of this controversy see *Annual Digest*, 1947, Cases No. 114 and 115.

Belligerent Occupation—Legislative Powers of Occupant—Decree Prohibiting Disposal of Enemy Property—Restrictive Interpretation of. **Case No. 185**

V. *v.* OGTEROP.

Holland, Court of Appeal, Arnhem. October 30, 1951.

THE FACTS.—In September 1944, during the occupation of Holland by the Germans, the plaintiff, a French subject, gave a packet of banknotes belonging to her to the respondent, a Dutch national, for safe custody. After the liberation of Holland she sued the defendant for repayment of the value of these banknotes, which had however in the meantime been stolen from the safe where he had put them together with his own papers. The defendant pleaded in his defence a German Occupation Ordinance (No. 26 of 1940) dealing with enemy property in occupied Holland which, *inter alia*, prohibited any act of disposal thereof. Under the Decree on Occupation Measures (E 93), as interpreted by the Supreme Court, the Ordinance was to be regarded as having been legally in force during the occupation. The defendant contended that the contract of custody between himself and the plaintiff was therefore void, so that the plaintiff could derive no rights under it as against him. The District Court of Arnhem having held that the plaintiff's claim must fail, she appealed.

Held (by the Court of Appeal): that the judgment of the Court below must be reversed and the case referred back for the plaintiff to adduce additional evidence of what had happened at the material times. It was true that the Ordinance had been in force during the occupation, but it must be interpreted

Case No. 185 *Contd.* restrictively. The nature and the purpose of the Ordinance was spoliatory ; it was intended to force, under the threat of severe punishment, those who held property belonging to others to declare to the occupation authorities all enemy property in their custody in Holland. This was done with a view to the liquidation of such property for the benefit of Germany. As between parties who were not Germans, however, the act of disposal must be considered valid, so that the parties derived mutual rights and obligations under it in the normal way.

[Report : *N.J.*, 1952, No. 728.]

Case No. 186 **Belligerent Occupation—Rights of Occupant—Liability of Lawful Government for Acts of the Occupant—Requisition of Lands Leased to State—Whether State Bound after Liberation to Pay Arrears of Rent—Contracts Entered into with Municipalities or Government Officials—Power to Bind Occupied State after its Liberation.**

City of Roermond *v.* The Netherlands Ministry of War.

Holland, District Court of The Hague. March 17, 1948.

Court of Appeal, The Hague. February 14, 1952.

The Facts.—Before the outbreak of war between Germany and the Netherlands, the municipality of Roermond had leased to the State certain lands belonging to the municipality, for use by the Ministry of War for military manœuvres. After the occupation of Holland, the German Wehrmacht took these properties over for their own use. After the war, the municipality sued the State for payment of the rent which had remained unpaid for the period during which the German forces used the lands.

Held (by the District Court) : that the action must fail. The State was not obliged to pay rent for that period. The property was leased to the State for the express purpose of being used by the Ministry of War for military exercises. After the occupation the German Wehrmacht was entitled under the laws of war to take over the lands and the State had to acquiesce in that action of the Occupant. It was irrelevant whether the Occupant did or did not in fact use the lands for the same purpose after taking them over. Nor did the validity under international law of this taking over depend on the question whether the Occupant had strictly observed the rules which he had himself laid down (in Occupation Ordinance No. 144 of 1940) for requisitioning of State property. The State was held, in the circumstances, not to be under any obligation under Netherlands law to pay rent to the City of Roermond for the period during which it had legally been deprived by the Occupant of the use of the lands for which they had expressly been leased.

The City of Roermond appealed.

Held (by the Court of Appeal, adopting the reasons given by the Court below): that the appeal must be dismissed.

[Report: *N.J.*, 1953, No. 182.]

NOTE.—Under Article 1 of the special Law of October 13, 1950 (*Staatsblad*, No. K 451),[1] the Court of Appeal at The Hague was empowered to declare, at the request of the State, a province, or a municipality, whether any given contract entered into by Netherlands officials on behalf of the State or other public body during the German occupation of the Netherlands from 1940 to 1945 did or did not flow from the Occupant's duty to restore or maintain public life and order in occupied territory (see *Annual Digest*, 1949, p. 458, Note, and *International Law Reports*, 1950, Case No. 136 (*Rohde* v. *Rheden*)). The effect of such a declaration would be that the State or other public body concerned was not bound by the contract in question.

Other cases in which such a declaration was made by the Court of Appeal of The Hague included:

City of Vlaardingen v. *de Snayer*, decided on May 29, 1951: a contract entered into at the end of 1944 between the then Nazi Burgomaster of Vlaardingen and a contractor for the setting up on grasslands of wooden poles with wire stretched between them, intended as a defence against the possible dropping of Allied parachute troops and landings of Allied aircraft. The Court held that these defences were ordered by the enemy with a view to hindering the liberation of the country and that they consequently had no connection with the duty of the Occupant of ensuring public order and public safety in the country under occupation. [Report: *N.J.*, 1951, No. 603.] On appeal, the declaration was confirmed by the Supreme Court on February 22, 1952. [Report: *N.J.*, 1952, No. 157.]

The State of the Netherlands v. *van N.*, decided on November 10, 1951: the purchase of books by the (Occupation) Ministry of Popular Enlightenment and Arts on behalf of Dutch Nazis who had fled to the eastern part of Holland in fear of the impending Allied invasion. [Report: *N.J.*, 1952, No. 385.]

State of the Netherlands v. *Jeugdherbergcentrale*, decided on November 10, 1951: a contract for the organization of a youth conference in a Nazi youth hostel by the same (Occupation) Ministry with a view to inculcating Nazi doctrines into Dutch youth. [Report: *N.J.*, 1952, No. 397.]

Municipality of Rheden v. *Rohde*, decided on November 10, 1951: contract between a municipality, on the orders of the German Sicherheitsdienst (Security Service), and a contractor for the carrying out of certain installations at a villa at Velp for use by the Security Service as a prison for the purposes of the German occupation authorities. [Report: *N.J.*, 1952, No. 391.] This was by way of an

---

[1] See *Annual Digest*, 1949, p. 458, Note.

Case No. 186 Contd. appeal from the decision of the District Court of Arnhem of July 20, 1950, *sub nom. Rohde* v. *Rheden* (*International Law Reports*, 1950, Case No. 136).

State of the Netherlands v. " *ANIEM* " : lease of an office in Amsterdam to a Netherlands Government Board for the use of the German Devisenschutzkommando. For the earlier proceedings see *Annual Digest*, 1949, Case No. 163, *sub nom.* " *ANIEM* " v. *State of the Netherlands* (and also *N.J.*, 1951, No. 269). On the rehearing on April 3, 1951, the State adduced evidence to show that the activities of the Devisenschutzkommando consisted of tracing infringements of Occupation ordinances which were issued mainly in the interest of financing the German war effort and also with a view to depriving Netherlands Jews of their property. [Report: *N.J.*, 1951, No. 269.]

In other cases the decision depended on the date of the contract in question, as, for example, leases entered into by the State Buildings Department with private house-owners on behalf of the so-called Nederlandse Arbeidsdienst (Netherlands Labour Service), which was originally set up for reconstruction (Opbouwdienst), but which subsequently developed into a Nazi organization. Cf. two judgments of the Court of Appeal at The Hague, of the same date, April 3, 1951, concerning two tenancy agreements, entered into on behalf of that organization. It was held that the State was bound by one dated in August 1941 [Report: *N.J.*, 1951, No. 270], but not by the other dated in January 1943 ([Report: *ibid.*, No. 271]. In between the two dates the Nazi purpose of the organization had been publicly declared.

Case No. 187 **Belligerent Occupation—Judicial Powers of Occupant—Tribunals of Occupant—Whether Foreign or Municipal Tribunals —Conviction by Tribunal of Occupant for Criminal Offence under Substantive Law of Occupant—Subsequent Trial before Occupation Tribunal for Similar Offences under Substantive Law of Occupied Territory—Whether Accused Liable to Punishment as Recidivist.**

UNITED STATES HIGH COMMISSIONER FOR GERMANY *v.* MIGO AND ANOTHER.

Germany (*United States Zone of Occupation*), *United States Court of Appeals. October* 23, 1951.

THE FACTS.—In this case the accused were charged with larceny under s. 242 of the German Penal Code. On two previous occasions they had been convicted, by an American military tribunal exercising jurisdiction in occupied Germany, of " stealing property of the Allied Forces ", as provided in one of the United States Military Government Ordinances. The prosecution contended that the accused were liable to punishment as recidivists by virtue of s. 244 of the German Penal Code which provides that where a person has, on two previous occasions, been punished " in Germany " (*im Inland*) for larceny, he shall be liable to punishment as a recidivist. On behalf of the accused it was contended that the two previous convictions were not convictions obtained " in Germany ", and that the accused could therefore be punished only as first offenders.

Held: that " clearly an occupation court applying occupation law delivers a foreign judgment although it is geographically in Germany ", and that the accused were accordingly liable only to punishment as first offenders.[1]

[Report: (1951/2) XIII C.A.R. (U.S.) 178.]

Belligerent Occupation—Judicial Powers of Occupant—Tribunals of Occupant—Whether Exercising Foreign or Municipal Jurisdiction—Conviction of Civil Servant for Criminal Offence—Whether Conviction by Tribunal of Occupant Tantamount to Conviction by Municipal Tribunal. **Case No. 188**

In re DISMISSAL FROM THE CIVIL SERVICE.

German Federal Republic, Administrative Court of Appeal of Lüneburg. August 22, 1951.

THE FACTS.—The plaintiff, a German civil servant, was convicted of certain criminal offences by a war crimes court established by the British authorities in occupied Germany. If the conviction had been obtained before a German court the German authorities would have been entitled, by virtue of the relevant provisions of the German Civil Service Code, to dismiss the plaintiff from the civil service, without the requirement of additional disciplinary proceedings. Having been so dismissed, the plaintiff contended that his conviction by a tribunal of the Occupying Power was not a conviction by a German court and that his dismissal, in the absence of subsequent disciplinary proceedings, was therefore illegal. On behalf of the defendants it was contended that it was immaterial whether the tribunal which pronounced the conviction was a foreign or a municipal tribunal, and that the only relevant factor was the severity of the sentence, and that as the sentence was in itself sufficiently severe to justify dismissal, the plaintiff had been rightly dismissed.

Held: that the tribunals of the Occupying Power exercised jurisdiction on the basis of international law and did not exercise German jurisdiction, and that a conviction obtained before such tribunals was not capable of justifying the plaintiff's

---

[1] This case may be contrasted with the *Recidivist* (*American Tribunal*) *Case* (Case No. 189 in this volume), where the Court of Appeal of Frankfurt held that a person who, in similar circumstances, stands trial before a German court after previous convictions under German law by an occupation court is liable to punishment as a recidivist.

Case No. 188 *Contd.*

dismissal, in the absence of separate disciplinary proceedings. The Court said:

"The lower Court was right in stating that the tribunals of the Occupying Powers in Germany exercise their own jurisdiction on the basis of international law and do not exercise German jurisdiction. In any event, this applies to the functions of the war crimes tribunals. This consideration removes the support of the basic idea which might possibly justify s. 53 (1) of the German Civil Service Code, viz. that the guarantees of a separate formal disciplinary action are not required where a civil servant has already been sentenced, 'in accordance with the conditions and formalities' of German general criminal law and procedure 'laid down by law', to punishment which is so severe that the need for his removal from the public service is obvious. . . . The reason which caused the legislature, in certain circumstances, to dispense with a repetition of the proceedings before a disciplinary court was obviously the conviction that all the persons who took part in the findings of the criminal court would be familiar with the principles of German criminal law as well as those of German civil service law, and that they had the same outlook as the legislature itself and as those persons who might eventually take part in subsequent disciplinary proceedings. This consideration must needs lead to the conclusion that proceedings before a tribunal of the Occupying Power which, as regards both substantive and procedural law, is subject to other concepts and rules, are not comparable to disciplinary proceedings according to German law and incapable of taking their place. For this reason the judgment of a tribunal of an Occupying Power does not result in loss of office, as would be the case if certain judgments of German courts were concerned.

"The defendants contend that the decisive factor is the severity and nature of the punishment inflicted, and not the offence as such, or the type of tribunal. This contention must be rejected. The conclusion to be drawn from the wording and meaning of the law is to the contrary effect. The defendants further contend that German courts are precluded from entering into an investigation as to whether the judgment of a tribunal of an Occupying Power has been arrived at in accordance with all legal requirements. This view is certainly correct, but the contention of the defendants cannot succeed because we are not concerned with any such investigation, but with the question—which is entirely different—as to whether the judgment of the tribunal of the Occupying Power resulted in loss of office, a result which that tribunal probably did not envisage, possibly did not intend, and in any event did not expressly provide for. This latter question was the only one which this Court had to determine."

[Report: *NJW*, 4 (1951), p. 816.]

Case No. 18

Belligerent Occupation—Judicial Powers of Occupant—Tribunals of Occupant—Whether Foreign or Municipal Tribunals—Conviction for Criminal Offence—Whether Conviction Renders Convicted Person Liable to Punishment as Recidivist in Subsequent Proceedings before Municipal Court—The Law of Germany.

RECIDIVIST (AMERICAN MILITARY TRIBUNAL) CASE.

German Federal Republic, Court of Appeal of Frankfort.
January 31, 1951.

THE FACTS.—The appellant, on more than one occasion, was convicted of larceny within the meaning of the German Penal Code, in proceedings before an American military tribunal exercising jurisdiction in occupied Germany. He was subsequently charged with a further offence of larceny before a German court. The prosecution contended that the convictions obtained against him before the American tribunal constituted previous convictions "in Germany" (*im Inland*) within the meaning of s. 244 (1) of the German Penal Code, with the result that in accordance with that section the appellant was liable to punishment as a recidivist. On behalf of the appellant it was contended that the convictions obtained against him before the American tribunal were not convictions "in Germany", and that he was liable only to punishment as a first offender.

Held: that the military tribunals of the Occupant, more especially when applying German substantive law, were German courts for the purpose of determining whether a conviction obtained before them was a conviction obtained in Germany, and that accordingly the appellant was liable to be punished as a recidivist.[1] The Court said:

"The Courts of Appeal of Hamm and Celle[2] regard the courts of the Occupying Power, without more, as foreign courts. As against that we must, however, stress the fact that as from 1945 onwards the Occupying Power existed not only side by side with German State authority, but was immediately substituted for the latter. This unique situation undoubtedly resulted in the Occupying Power exercising German sovereignty to the fullest extent. After 1945, therefore, German sovereignty was derivative *quoad* the Occupying Power. The latter was entitled, without any further requirements, to transfer to its own jurisdiction any proceedings pending before German courts. The conclusion to be drawn from these factual circumstances is that the judgments of the Occupying Power cannot

---

[1] *Contra: Recidivist* (*Military Tribunal of Occupant*) *Case* (Case No. 190 in this volume); also a decision of the Court of Appeal of Celle, of November 8, 1950, which was concerned with previous convictions obtained before a tribunal set up by the British authorities in their zone of occupation (*NJW*, 4 (1951), p. 85).

[2] See *supra*, n. 1.

Case No. 189 *Contd.* be regarded as foreign judgments, more especially in cases where, as happened in the present case, the military tribunals have applied German substantive criminal law.

Moreover, in so far as concerns the Land of Hesse, the question whether judgments of American military tribunals are previous convictions in the technical sense has been determined in an affirmative sense by means of an express order of the Military Government. By virtue of this order the office of the Military Government has expressly ordained that the findings of military tribunals shall be treated in the same manner as the findings of German courts when the requirements of recidivism are under investigation. This order is still in force and binding. It may be added that there is no fundamental reason why convictions obtained before occupation tribunals should not result in recidivism. At most it might be asked whether the criminal offence tried as larceny by the occupation tribunals also constitutes larceny within the meaning of German law. This question, however, is no longer material when the occupation tribunals apply German substantive criminal law. In view of the circumstances here described, the diversity of the rules of procedure cannot cause any decisive doubt to arise. In any event, there is no valid reason why the answer to the question whether a conviction can result in recidivism should be made dependent on the fortuitous circumstance whether the conviction has been pronounced by a German court or an occupation tribunal. This Court therefore, contrary to the decisions reached by the Courts of Appeal of Hamm and Celle, is of opinion that the judgments of American occupation tribunals are capable of resulting in recidivism to the same extent as the judgments of German courts."

[Report: *NJW*, 4 (1951), p. 372.]

Case No. 190

Belligerent Occupation—Judicial Powers of Occupant—Tribunals of Occupant—Whether Foreign or Municipal Tribunals—Conviction for Criminal Offence—Whether Conviction Renders Convicted Person Liable to Punishment as Recidivist in Subsequent Proceedings before Municipal Court—The Law of Germany.

RECIDIVIST (MILITARY TRIBUNAL OF OCCUPANT) CASE.

German Federal Republic, Federal Supreme Court.
October 25, 1951.

THE FACTS.—Section 244 (1) of the German Penal Code provides that a person who has been convicted on two previous occasions "in Germany" (*im Inland*) of the offence of larceny shall, if convicted on a third occasion, suffer punishment as a recidivist. The appellant had several previous convictions for larceny, but only one of these was a conviction by a German court, while all the others were convictions by tribunals of one or other of the Powers then in occupation of Germany. It was contended on his behalf that he had only one previous conviction "in Germany", all the others being convictions by foreign courts, and that accordingly he was not liable to punishment as a recidivist. On behalf of the prosecution it was contended that all the previous convictions, including those by tribunals of the Occupying Powers, were convictions obtained "in Germany", and that the appellant was therefore liable to punishment as a recidivist.

Held: that, contrary to the view taken by the Court of Appeal of Frankfort in a similar case,[1] convictions by tribunals of the Occupying Powers were not convictions obtained "in Germany", and that accordingly the appellant was not liable to punishment as a recidivist. The Court said:

"The accused has been punished in Germany for larceny on several previous occasions, but only once before by a German court, and on the other occasions by tribunals of the Occupying Power. The words "in Germany" (*im Inland*), as used in s. 244 of the Penal Code, are not to be understood in the territorial sense; on the contrary, they signify that a German court must have exercised jurisdiction. The decisive criterion is that the several verdicts which have resulted in punishment for recidivism must be verdicts of courts subject to the same supreme judicial power, viz. to German supreme judicial power.

"This view, which is the view of the (former) Supreme Court (Reichsgericht) and the only view that does justice to the meaning and purpose of the provision here referred to, must be followed by this Court. The official version of the reasons accompanying the preliminary draft of a German Penal Code shows that the requirement of a conviction in Germany was postulated so as to make certain that the conditions of recidivism according to German law would be genuinely fulfilled. Only a conviction by German courts and in accordance with German criminal law provides the requisite guarantee that an offender has been convicted of such offences as can form the basis of recidivism. This is precisely the reason why a higher punishment is inflicted in respect of an offence arising from recidivism.

For these reasons the provisions governing recidivism are not ousted by the fact that the punishment may have been inflicted by German courts exercising jurisdiction in a foreign country occupied by Germany or by a German court which at the time when the conviction was obtained was still a German court, notwithstanding that the place where it was then exercising

---

[1] See *Recidivist* (*American Military Tribunal*) *Case* (Case No. 189 in this volume).

Case No. 190 *Contd.* jurisdiction now no longer forms part of German territory. On the other hand, having regard to these considerations, the verdicts of the tribunals of one of the Occupying Powers exercising jurisdiction on German soil cannot form the basis of recidivism. The contrary view of the Court of Appeal of Frankfort must be rejected." [1]

[Report: *NJW*, 5 (1952), p. 151.]

Case No. 191 **Belligerent Occupation—Judicial Powers of Occupant—Delegation of Powers of Occupant to Authorities of Occupied Country—Delegation of Power to Administer Booty—Determination of Issue whether Goods are Booty or Private Property—Whether Courts of Occupied Country Competent to Determine Issue.**

BOOTY (DETERMINATION OF OWNERSHIP) CASE.

German Federal Republic, Administrative Court of Appeal of Münster. May 17, 1951.

THE FACTS.—By virtue of legislation enacted by the Occupant, the right to administer the property of the former German armed forces was delegated to the authorities of occupied Germany. The plaintiff claimed the release to him of certain goods which had been seized by the German authorities as being property belonging to the former German armed forces, and which he alleged to be his own personal property. In the present proceedings the question arose whether the German administrative courts were competent to determine the preliminary issue whether the property in dispute belonged to the plaintiff or to the former German armed forces.

Held: that the German administrative courts were entitled to determine the preliminary issue of ownership, notwithstanding that the military government authorities of the Occupant were not subject to the jurisdiction of the German courts. The issue before the Court was not an enquiry into the legality of the legislative acts of the Occupant, but a factual enquiry as to the true ownership of the property in dispute. The Court said:

"The fact that the military government authorities are not subject to the jurisdiction of the German courts and that the latter are accordingly not entitled to enquire into sovereign acts of the military government authorities does not preclude the institution of proceedings, before the administrative courts, for the invalidation of an act whereby the defendants have seized property, if the proceedings are directed to showing that the defendants were wrong in describing the property seized as being property of the former Wehrmacht. The German authorities did not, by being entrusted with the right to seize and dispose of former Wehrmacht property, become military government authorities; on the contrary, they continued to be German authorities. The exemption of acts of the German authorities from the right of scrutiny of the German courts cannot be inferred—contrary to the view expressed by the lower Court—from the principles of international law when the proceedings to invalidate such acts are based on the contention that the property seized is not the property of the German Wehrmacht. . . . Any other view as to the legal position and the powers of the competent German authorities would mean that in one sector of public administration—contrary to the wording, intent and purpose of Military Government Ordinance No. 165 and Article 19 (4) of the Constitution[1]—a person whose rights have been violated by the German Executive would be deprived of the right to apply to the courts."

---

[1] See previous footnote.

[Report: *NJW*, 5 (1952), p. 680.]

Occupation of Enemy Territory—Rights and Duties of Occupant—Right of Requisition—Articles 3 and 52 of Hague Regulations, 1907—Incorporation of Hague Regulations in Municipal Law—Rights of Individuals to Redress in Respect of Unlawful Requisitions or Requisitions Not Paid For. **Case No. 192**

SOC. TIMBER, SOC. ZETA, SOC. OMBLA *v.* MINISTERI ESTERI E TESORO.

Italy, Court of Cassation. April 30, 1951.

THE FACTS.—The appellants were Yugoslav corporations which sought, as against the Italian Ministries of Foreign Affairs and Finance, reparation and restitution in respect of the allegedly illegal seizure or requisition of their property, and notably stock-in-trade and machinery, effected by the Italian military forces in Yugoslavia. On appeal from the dismissal of the suit by the Civil Tribunal of Rome,

Held: that the appeal must fail. The basis of its dismissal was, principally, that the various statutory provisions relied upon by the appellants as establishing a right to compensation in respect of requisitioned property applied only where the requisitioning had taken place in Italian territory. But the Court observed further: " Because of their special character requisitions made by occupation authorities are the subject of international regulation and are governed primarily by international customary rules designed to protect the fundamental rights of the population of occupied territory by limiting the freedom of action of the occupant. In modern times these rules have been translated into written law. Article 52 of the Hague Convention of July 29, 1899 (ratified on September 4, 1900, by Italy, which country implemented the Convention by Royal Decree No. 504 of December 9, 1900), thus lays down that: 'Neither requisitions in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to imply for the population any obligation to take part in military operations against their country. These requisitions and services shall only be demanded on the authority of the Commander in the locality occupied. Supplies in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged.' This was derived from Articles 40 ff. of the Brussels Declaration of October 18, 1874, drawn up by the Conference of that year, which failed to come into force for lack of ratification. Article 52 of the Hague Convention of October 18, 1907 (not ratified by Italy), maintains the text unchanged, merely adding the words '. . . and the payment of the amount shall be made as soon as possible'.

---

[1] Article 19 (4) of the Constitution of the Federal Republic of Germany provides that anyone whose rights have been violated by the Executive shall be entitled to apply to the courts.

"This rule sets limits to and imposes conditions on the power of requisition. But it is clear that its violation can involve responsibility only on the international plane, that is to say as between State and State, and that an inhabitant of occupied territory acquires thereunder no individual right as against an occupying Power failing to observe the limits and conditions imposed upon it. Nor does the incorporation of international law into municipal law create in this context any responsibility on the part of the Occupant, or any corresponding right in any individual. The rule in question has indeed been adopted into Italian law as a result of the enactment of the Articles of War contained in Royal Decree No. 1415 of July 8, 1938, Article 62 of which substantially reproduces Article 52 of the Hague Convention of 1907. Because of this circumstance it is unnecessary to consider whether the rule is to be deemed to be impliedly adopted *qua* a rule of customary international law or as a consequence of the decree providing for the implementation of the convention wherein the rule is contained. It suffices to observe that the doctrine of implied incorporation, which Article 10 of the new Constitution adopts, was, before the entry into force of that Constitution, of limited effect and applied normally in relation only to rules of customary international law. It could not, and cannot now, apply so as to import into municipal law obligations different from or greater than those created by the relevant international rule, but only obligations corresponding exactly to those arising from that rule. Similarly, a decree providing for the implementation of a treaty can effect the incorporation into municipal law only of such stipulations as admit of such a transmutation—stipulations, that is to say, corresponding in content to rules of municipal law. Such a decree cannot create municipal rules corresponding to international rules which are not so expressed as to be capable of precise application. Generally expressed international rules require for their application as municipal law the enactment of precise municipal rules even when the intent is merely to reproduce their substance without change. Where the State concerned wishes not merely to make its conduct conform to the requirements of international law and to provide for the performance of its obligations towards other States, but to go further and undertake obligations of a more ample and different character and to create rights for individuals, municipal legislation is even more necessary. But, as has been pointed out, the rule as to requisitions in enemy-occupied territory laid down in Article 52 of the Hague Convention is reproduced in Article 62 of the Articles of War. As so reproduced the rule reads: ‘ Requisitions in kind or of services can be demanded from communes and inhabitants only for the necessities of the army of occupation. They must be in proportion to the resources of the locality, and of such a nature as not to imply for the population any obligation to take part in military operations against their own country. They are to be paid for in cash; where this is not possible, the price therefor is to be fixed at the time of delivery of the goods and payment made as soon as possible. Requisitions shall only be made on the authority of the local commander of the occupying force.’

“ In order to decide whether there is jurisdiction to entertain the instant claim, the principal problem of the case must be examined: that is, whether the appellants’ claims to restitution and reparation, both based on the allegedly unlawful quality of the requisitions exacted, can be advanced on the basis of the rule set out. It must be held irrelevant to this enquiry that, at the time of the acts complained of, a civilian had been appointed as High Commissioner in Montenegro and civilian officials placed in charge of the appellant corporations. For we have to do with a régime of belligerent occupation, and the relevant rules of international law apply just as they do when requisitions by military authorities are in question. By reproducing the international legal rule applicable in its own law, the Italian State does no more than declare its recognition of its international obligations and direct occupation authorities under its control to conduct themselves conformably to the accepted principles. It has not thereby assumed any additional obligations towards other States nor any obligations of municipal law towards individuals who may have been prejudiced by requisitions which are unlawful or which, though lawful, have not been paid for as prescribed. Thus the inhabitants of

Case No. 192 *Contd.* the enemy State, be they citizens or foreigners *vis-à-vis* that State, acquire no rights available directly against the Italian State. Individuals are not subjects of internationally illegal acts. Such acts, though they may injure individuals, are relevant only in relation to the State to which the individuals concerned belong and whose interest it is to protect them. And it is in the light of this that the recital in Article 3 of the Hague Regulations, to the effect that a belligerent party violating their provisions may be liable to make compensation and is responsible for all acts committed by persons forming part of its armed forces, is to be understood.

" This is confirmed by the fact that the Head of the Government, in his speech in the Senate on the Law of May 2, 1938, giving power to the Royal Government to prescribe rules for the conduct of war and respecting neutrality, emphasised the expediency of strict observance of the rules of international law regulating warfare on land and underlined the necessity of ' adopting firm rules to serve as a guide to the Government and the armed forces in time of war '. Senator D' Amelio similarly stressed that the intent of the law was to lay down rules for the conduct of the authorities in time of war.

" But the very text of Article 62 demonstrates the impossibility of control by the ordinary courts over possible abuses of the right of requisition. That Article has to do with limitations and conditions based on the necessities of the army of occupation and the observance of a due proportion to the resources of the occupied locality. And these are essentially discretionary matters. The alleged illegality of any particular requisition can only be within the judgment of specially constituted organs, as is the case with discretionary acts of municipal authorities. It cannot be assessed by the ordinary courts, whose power of review is derived always from a rule of law directly protecting individual interests and designed to raise them to the level of a veritable subjective right. Hence, if any cognizance can be taken, otherwise than in pursuance of a treaty of peace, of damage to nationals of another State, it can be taken only by the appropriate administrative organs.

" The contention of the appellant corporations that what they are claiming is in substance restitution of property which has been taken from them, does not affect the matter. For all the property of the appellants, as they admit, was ultimately destroyed or burned, so that the claim to restitution is merely colourable and amounts to a claim for damages. And, where a claim for damages is advanced in respect of the conversion of property, the relationship between the parties falls to be examined and, equally, the cause of the dispossession of the claimant—which in the instant case was requisition by the Italian State in its capacity as Occupant of foreign territory. Seizures of this sort, when they cannot be considered as individual acts, all fall under the heading of belligerent requisition in occupied enemy territory and are to be governed by the rules discussed already. . . ."

[Report: *Foro italiano*, 1952, I, p. 898.]

Belligerent Occupation—Rights and Duties of Occupant—Jurisdiction over Offences against Occupying Force—Hague Regulations concerning Laws and Customs of War on Land—Sentence to Imprisonment for Term Beyond Period of Occupation. **Case No. 193**

Re SCARPATO.

Italy, Court of Cassation. July 14, 1951.

THE FACTS.—Scarpato was convicted of the murder of a British sailor and was sentenced to death by the Allied General Military Court of Catania, the sentence being subsequently commuted to one of imprisonment by the Allied Control Commission. The crime was committed in Augusta after the restoration of that area to Italian control. Royal Decree-Law No. 31 of February 11, 1944, provided, however, pursuant to Agreements between Italy and the Allies, for the retention or assumption of jurisdiction by Allied military tribunals over, *inter alios*, crimes against members of the Allied forces. The Agreements provided for the trial of such crimes according to Italian substantive law, subject to the application of their own procedural rules by the tribunals concerned, and for the carrying out of sentences by the Italian authorities. The defendant moved to set aside the conviction.

Held: that the motion must be dismissed, it being competent to an occupying Power to impose sentences in respect of crimes against its forces running beyond the period of the occupation. The Court said: " Upon the restoration to Italian control of various districts of southern and insular Italy subject to the Allied Military Government, pursuant to Agreements made with that Government, Italy promulgated Royal Decree-Law No. 31 of February 11, 1944. This measure provided for the recognition both of the validity of convictions by Allied military tribunals in the restored districts and of the continuing jurisdiction of those tribunals with respect to crimes committed in those districts against the Allied forces by Italian citizens. Article 3 provided in especial that ' Any person committing within liberated territory any act hostile to, or any crime against the property of, the Allied military forces or their members, or the officials or other representatives or agents of the United Nations, or any seditious act against the Allied Powers, or any act calculated to obstruct the war effort or assist the enemy, is liable to the penalties prescribed by Italian

Case No. 193 *Contd.* criminal law and to trial therefor by the Allied military tribunals, acting in accordance with their own procedure.' The conviction here sought to be set aside arose under this Article, Scarpato having been found guilty of an act hostile to the Allied forces (the killing of a British sailor at Augusta on March 19, 1944) and condemned to death by the General Allied Military Court of Catania, and the sentence having been on August 21, 1944, commuted by the Allied Control Commission to one of imprisonment.

" It may be noted, though it may not be relevant to the instant case, that, when further restorations of mainland districts were made, the Article referred to was modified by Royal Decree-Law No. 162 of July 20, 1944, in the sense that jurisdiction thereunder was confided primarily to the Italian courts, subject to the right of the Allied military tribunals to require the transfer to them of any particular case.

" The first question which arises upon the instant motion is whether the Royal Decree-Law of February 11, 1944, which implemented internally the Agreement with the Allied Military Government, was promulgated lawfully and whether it still has the force of law. The appellant's contentions in this regard lack cogency. As respects first his argument that the Decree-Law is invalid *ab initio* because it deals with matters beyond the legislative competence of the Government and because the Government did not, as a result of the armistice, have full freedom of action at the time of its promulgation, this must be rejected *in limine.* For, apart from any other consideration, it is manifest that these alleged defects, assuming they ever existed or could be proved before this Court, have been cured by the conversion of the Decree into a statute by the legislature, which was effected by Law No. 178 of May 5, 1949. Incidentally, though again it may not be relevant here, the amending Decree-Law of July 20, 1944, was similarly given statutory force as a result of the conversion into a statute of Decree-Law No. 151 of June 25, 1944, whereunder it was promulgated, which Article XV of the transitional provisions of the Constitution effects.

" The Decree-Law cannot, either, be shown to have been valid only during the period of the armistice, being invalidated by the Treaty of Peace. Such a construction fails to take account of the fact that the Decree-Law provides for the implementation in Italian law without limit of time of the Agreements with the Allied Military Government. According to a rule of international law laid down by the Hague Conventions of 1899 and 1907 and incorporated, in virtue of Law No. 1415 of July 8, 1938, in Article 235 of the Italian Articles of War, an Occupying Power may, through its own military tribunals and in accordance with its own substantive law and procedure, assume jurisdiction in occupied territory with respect to both military and other crimes committed by inhabitants against the occupying forces or persons belonging to or associated with those forces. This rule, which provides an instance of the independence of the law of war crimes of any principle of territoriality, involves as a corollary the right of the Occupant upon the termination of the occupation to remove convicted persons to serve out their sentences in his own prisons. But the full exercise of this right of the Occupant was limited by the Agreements referred to, whereunder it was provided in the first place (see the Decree of February 11, 1944), that Italian substantive law should apply in relation to offences committed after the restoration of the occupied territories to Italian control, and subsequently (see the Decree of July 20, 1944), that Italian courts should assume jurisdiction over such offences, subject to their possible removal to Allied military tribunals. It was also conceded, simultaneously with Italy's recognition in pursuance of these Agreements of the validity of Allied convictions inflicted either before the restoration of the territories concerned or, in the case of any removal of proceedings to the military tribunals, after that event, that convicted persons should serve or serve out their sentences in Italy rather than abroad. It would obviously be incompatible with the intent of the Agreements, and of the Decrees implementing them, to hold the latter effective only during the armistice and to refuse now to recognise and carry out, as foreign judgments accorded full recognition by Italy, sentences coming within their scope.

" It is not, furthermore, maintainable that the occupation of Italy by the United Nations lacked the quality of a belligerent occupation because, as from a particular point of time, it was perpetuated upon the terms of the armistice and thus with the consent of Italy. For an armistice merely suspends hostilities and does not constitute the conclusion of peace. Hence the occupation continued to be an operation of war even during the armistice and, in the absence of contrary stipulation, to give to the Occupant the jurisdiction which is given by the rule of international law already discussed, recited in Article 235 of the Articles of War. Nor, again, can it be contended that the Agreements which have been examined are to be interpreted otherwise because the restoration of occupied territory for which they provided was granted in consideration of Italy's assuming the rôle of a co-belligerent and of the entry into the war on the Allied side of our armed forces and of the forces of the Resistance. Such an argument ignores the circumstance that the restoration of the occupied territory to Italian control, though it may have been effected in consideration of this *quid pro quo,* modified, without dispensing altogether with, the exercise of the rights of the United Nations as occupying Powers. Similarly that act of restoration, and the agreements whereby it was effected, though they conferred certain benefits

Case No. 193 *Contd.*

on Italy which Italy accepted, did so subject to certain conditions, and in particular subject to the condition that full recognition should be accorded to sentences imposed by the Allied tribunals. It is likewise irrelevant that the Treaty of Peace makes no mention of this question of recognition of sentences. For that instrument, as its Preamble recites, is concerned with the settlement of issues still outstanding, and not with issues, such as that of the recognition of sentences, already settled by earlier agreements. Incidentally, those earlier agreements cannot be impugned on the ground that Italy lacked capacity to enter into them : just as the State could enter into the Treaty of Peace, so it could, prior to doing so, conclude valid agreements to run during and beyond the period of the armistice. Finally, the provisions of the new Constitution touching jurisdiction cannot be prayed in aid to establish the invalidity of the Decrees of 1944. For, apart from any other considerations, it is clear that these provisions have no retroactive effect and that they do not, any more than any other provision of the Constitution, invalidate any treaty duly entered into and implemented by Italy.[1]

" For these reasons the Court declares the Royal Decree-Law of February 11, 1944, to be of full force and effect, and further declares the conviction sought to be set aside to be effective and good conformably to that measure. It must now examine the alternative arguments whereby the conviction is challenged. The first of these is [based on Article 528 of the Code of Criminal Procedure and amounts to an allegation that the crime charged was not fully proved. It is] clearly inadmissible because, under the applicable Decree-Law and pursuant to Article 235 of the Articles of War, all questions of procedure and evidence in trials before the Allied tribunals are governed by those tribunals' own law. An Italian court cannot review any such question because to do so would be to deny recognition to convictions imposed by those tribunals. . . . It is equally inadmissible to allege error on the part of the Allied tribunal in determining its jurisdiction and in the application of the law by that court. For if it is the case that Article 3 of the Decree-Law defines the jurisdiction of the Allied tribunals and prescribes Italian law as the substantive law to be applied by them, it is also the case that the determination whether in a particular matter jurisdiction exists or how the substantive law applies, is the province of the trial court and not of the court of a country whose sole concern in regard to the proceedings arises from its having been entrusted with the carrying out of sentences therein imposed. The Italian State must be deemed to be satisfied with the conduct of the proceedings inasmuch as it does not, by Article 3 of the Decree-Law, qualify recognition of sentences imposed by making it subject to any system of review by its own courts. Any possible error, it may be added, can be remedied only by agreement between Italy and the United Nations. . . ."

---

[1] The Court here referred to its previous decisions of February 7, 1948, and March 15, 1949.

[Report: *Foro italiano*, 1952, II, p. 18.]

Belligerent Occupation—Rights and Duties of Occupant—Right of Requisition—Requisition by Puppet Government on Behalf of Occupant—Hague Regulations Concerning the Laws and Customs of War on Land. **Case No. 194**

In *Magnifica Comunità di Fiemme* v. *Soc. Import. Esport. Legnami*, on appeal from the Court of Appeals of Trento, the Italian Court of Cassation *held* on July 24, 1951, that the validity of requisitions made by the self-styled "Italian Socialist Republic" on behalf of the German army during the occupation of Italian territory carried out by that force before the declaration of war on Germany by the legitimate Government, and in particular of requisitions so made in the pre-alpine zone, which was always directly controlled by the Germans, was to be tested according to the Hague Regulations of 1899. And, where goods (timber), the requisition of which was legitimate under those Regulations, had at the direction of the German authorities been sold to a designated buyer, the fact that the termination of hostilities had prevented delivery was held not to constitute a failure of consideration nor to avoid the contract of sale (*Mass. Foro italiano*, 1951, p. 506).

Belligerent Occupation—Judicial Powers of Occupant—Judgments given by Tribunals of Occupant—Validity of—Termination of Validity—Subsequent to Termination of Occupation. **Case No. 195**

CRIMINAL FILES (GREECE) CASE.

Greece, Tribunal of First Instance of Thebes.
1951.

THE FACTS.—This was a petition, in accordance with Article 576 of the Greek Code of Civil Procedure, for the destruction of the judicial files bearing on the condemnation of the petitioner by a German military court during the German occupation of Greece. The accused had been sentenced to 15 years' forced labour for activities contrary to the security of the German occupation forces in Greece.

Held: that the petition must be granted. The Court said:

"During the military occupation of part of the territory of an enemy State, the forces of occupation are entitled to take

Case No. 195 *Contd.* the necessary legislative, administrative and judicial measures for the security of their troops and the success of their military operations. At the same time they are under an obligation, unless absolutely prevented, to respect the laws in force and the judicial authorities of the territory (Article 43 of the Hague Regulations). Accordingly, the Ordinance of February 27, 1942, of the German Military Governor of Southern Greece, which extended the operation of German law to occupied Greece, was in accordance with Article 43 of the Hague Regulations inasmuch as that Ordinance aimed at safeguarding the security of the troops and the success of the war. The condemnation of the petitioner, based as it was on Article 7 of the Ordinance in question, was therefore valid during the occupation. However, after the end of the occupation, when the Greek State recovered its sovereign rights which existed throughout *de jure* after being suspended *de facto*, the Ordinance in question issued by the German military authorities became automatically invalid and the condemnation of the petitioner lost its legal effects. Thus the Ordinance and the execution of the sentence pronounced as the result thereof ceased to be operative."

[Report : *Revue hellénique de Droit international*, 6, (1953), p. 278.]

Case No. 196

Belligerent Occupation—Administrative Functions of Occupant —Distinction between Administrative Functions of Occupant and Administrative Functions of Municipal Authorities— Appeal against Administrative Orders to Courts of Occupied Country—When Permissible.

DICKMANN *v.* FEDERAL MINISTRY OF SOCIAL ADMINISTRATION.

Austria, Administrative Court. June 8, 1951.

THE FACTS.—The flat of one E. in Vienna was requisitioned by the Soviet army of occupation, and E. and his family were evicted. The Vienna City Council thereupon issued an order to E., authorizing him to occupy part of the complainant's flat. The order bore the stamp of an officer of the Soviet army of occupation, preceded by the words " have no objection " in the Russian language. The complainant asked for the revocation of the order authorizing E. to occupy part of her flat, her contention being that the Vienna city authorities had failed to comply with the formalities laid down by the relevant Austrian law governing matters of this kind. Her application was refused on the ground that this was an order of the Occupant against which there was no appeal to the Austrian courts.

Held: (i) that this was an order of the Austrian authorities, and not an order of the Occupant, and that accordingly there was a right of appeal;

(ii) that the formalities of Austrian law had not been observed, and that the order must therefore be revoked. The Court said:

"The decision (against which complaint is made) argues in the main that the billeting order was not an administrative measure taken by an Austrian authority, but that the Austrian authority concerned acted exclusively in the capacity of an organ of the Occupying Power; that for this reason the relevant Austrian administrative legislation was inapplicable, and that the application of the complainant to the Austrian authority therefore had to be dismissed.

"The billeting order does not say that the representative of the Soviet army of occupation gave an order to the Vienna city authorities. The order says that he has no objection to the decision made by those authorities. The note of the military commander, with the addition of his signature and stamp, does not therefore adequately justify the view of the respondent authority that 'accordingly the arrangements concerning this flat were made on the direct order of the Soviet army of occupation.' The evidence of the official who issued the billeting order merely shows that the Occupying Power gave an order to secure another billet for the person whose flat had been requisitioned by the Soviet command. If the city authorities chose the particular method here under review in order to comply with this order, this method must be treated as an administrative act of an Austrian authority, in accordance with the relevant legal provisions applicable thereto.

"The decision (against which complaint is made) further argues that in the case under review the city authorities did not act in the exercise of sovereign rights within the framework of their constitutional sphere of activity, but exclusively as auxiliary organs of the Occupying Power, and that the relevant provisions of Austrian administrative law cannot therefore apply to the billeting order. We have already pointed out that the view put forward by the city authorities that they acted exclusively as auxiliary organs of the Occupying Power cannot be accepted."

The Court then dealt with questions of Austrian administrative law and decreed the revocation of the billeting order.

Decision No. 254/50/5 (not reported).]

Case No. 197 **Belligerent Occupation—Tribunals of Occupant—Whether Foreign or Municipal Tribunals—Law of Occupied Country Granting Amnesty—Terms of Imprisonment Exceeding Specified Period Excluded from Amnesty—Whether Sentences of Tribunals of Occupant to be Included in Specified Period—The Law of Austria.**

AUSTRIAN AMNESTY CASE.

Austria, Court of Appeal of Vienna. November 2, 1951.

THE FACTS.—The Austrian Amnesty Law of 1950 provided that the benefits which it conferred would not be granted to persons who had been sentenced to terms of imprisonment amounting in the aggregate to more than one year for offences committed between the date of the liberation of Austria and December 31, 1948. During the relevant period the respondent had been sentenced by Austrian courts to terms of imprisonment amounting in the aggregate to about seven months. He had also been sentenced by British military tribunals to terms of imprisonment which, if added to the sentences passed by Austrian courts, would amount in the aggregate to more than one year. It was contended on his behalf that as the British military tribunals were not Austrian courts and as the sentences inflicted by the latter amounted to less than one year, he was entitled to the benefits of the Amnesty Law of 1950. This contention was accepted by the Court of first instance. The public prosecutor appealed and contended that no distinction should be made between sentences of Austrian courts and those of British military tribunals, and that as the aggregate of all these sentences exceeded one year, the respondent was not entitled to the benefits of the Amnesty Law.

Held: that the respondent was not entitled to the benefits of the Amnesty Law, and that the appeal of the Public Prosecutor must be allowed. The Court said:

" The Amnesty Law of 1950 does not apply to this case because the aggregate of the terms of imprisonment . . . exceeds one year. Section 2 of the Law of 1950 does not make any distinction between convictions by municipal and foreign courts in so far as concerns the question of aggregating sentences. Moreover, it must be borne in mind that the sentences inflicted by British military tribunals must be registered in the register of convictions and that the punishments inflicted by them must be purged in the same way as those inflicted by Austrian courts. For this reason convictions by foreign courts must be treated on the same basis as convictions by municipal courts in the related matter of amnesties, notwithstanding that the Law of 1950 does not contain any express provision to this effect."

[Report: J.B., 74 (1952), p. 140.]

Belligerent Occupation — Legislative and Administrative Powers of Occupant—Making Currency of Occupant Legal Tender in Occupied Territory—Right of Debtor to Discharge Debt in Currency of Occupant—Legal Consequences of Refusal of Creditor to Accept Tender in such Currency.

Case No. 198

G. *v.* H.

Luxemburg, District Court. June 20, 1951.

The Facts.—Before the Second World War the plaintiff, a Luxemburg national, had a money claim against the defendant, another Luxemburg national. After the occupation of Luxemburg by German armed forces the latter decreed that all debts owing in Luxemburg currency could be validly discharged by payment in Luxemburg or German currency. The defendant thereupon tendered part of the debt in Reichsmark, but the plaintiff refused to accept such tender. The defendant having lodged a complaint with the German authorities, the latter fined the plaintiff for having refused to accept payment of the debt in Reichsmark. After the end of hostilities the plaintiff brought an action against the defendant claiming the amount of the fine which he had been forced to pay as a result of the information supplied by the defendant to the German authorities. The action was framed in tort. On behalf of the defendant it was contended that, by virtue of the Fourth Hague Convention of 1907, the German authorities were entitled to make German currency legal tender in Luxemburg, that the plaintiff's refusal to accept payment in Reichsmark was therefore unlawful, and that accordingly the action taken by her, the defendant, to safeguard her rights was incapable of constituting a tort which would entitle the plaintiff to claim the amount of the fine by way of damages. On behalf of the plaintiff it was contended that the German decree providing that debts existing before the occupation of Luxemburg could be discharged by payment in Reichsmark constituted a violation of the Fourth Hague Convention, and that the defendant in lodging a complaint against the plaintiff's refusal to accept such payment, had committed a tort and was accordingly liable to indemnify him in respect of all damage resulting therefrom, viz. the fine which he had been forced to pay.

Held: that the plaintiff's contention was correct and that the defendant was accordingly liable to pay the amount of the

Case No. 198 *Contd.*

fine which the plaintiff had been forced to pay to the German authorities. The Court said :

" H. contends that the German occupation authorities were entitled, by virtue of the Fourth Hague Convention of October 18, 1907, to decree that German banknotes were to be legal tender in occupied Luxemburg. She further contends that, having regard to the attitude of G. and the absence of any Luxemburg authorities, she had to apply to the German military authorities, who were the only authorities then present, to safeguard her rights. However, even if it is true that the Hague Convention here referred to imposes a duty upon the Occupant to pay for services and supplies requisitioned by him, there is no convention authorising him to fix, in a manner which is arbitrary and damaging to the inhabitants of occupied territory, the exchange rate of his own currency in relation to that of the occupied territory, and to decree that it shall be legal and compulsory tender. More especially, in so far as concerns commercial transactions and private contracts expressed in the currency of the country prior to its occupation, such measures would violate private property which, as a general rule and by virtue of the Fourth Hague Convention of 1907, must be respected. Moreover, at the time in question the courts of Luxemburg were functioning normally and freely, and it follows that if H. considered herself as having suffered damage by reason of G.'s attitude, she could and ought to have applied to a Luxemburg court. An application to the military authorities of the enemy was therefore unjustified, and it could only have been intended to serve the purpose of causing these authorities to exert pressure on G. in order to procure an advantage to the defendant. Such an application, even if it fell short of denunciation within the meaning of the Penal Code, nevertheless amounted to a tort on the part of the defendant. In view of the fact that the punishment inflicted by the German military tribunal on the plaintiff was the direct result of the defendant's tort in applying to the local commandant's office at Roodt, H. is liable, by virtue of Article 1382 of the Civil Code, to make good the damage suffered by G. as a result of her, the defendant's, tort."

[Report : *Pasicrisie luxembourgeoise*, volume XV, p. 159.]

Belligerent Occupation—Judicial Powers of Occupant—Article 43 of Hague Regulations—Occupant's Right to Legislate in Economic Matters—Law Decreed by National Authorities Dominated by Occupant. **Case No. 199**

RANDSFJORDSBRUKET AND JEVNAKER KOMMUNE *v.* VIUL TRESLIPERI.

Norway, Supreme Court. November 30, 1951.

THE FACTS.—During the German occupation of Norway, the plaintiff Company had been forced to sell its property to another factory and to a municipality. The sale had been prompted by a threat to effect a forced sale, an expropriation, under a Statute promulgated by the Quisling Government imposed by the German occupation forces in Norway. Article 105 of the Norwegian Constitution of 1814 provides :

> " If the welfare of the State should demand that any person shall surrender his movable or immovable property for the public use, he shall receive full compensation from the exchequer." [1]

This Article had been considered so important that the Norwegian Parliament had never promulgated any general enabling law, though individual Statutes were promulgated from time to time in matters of expropriation. During the war the Nazi authorities issued such a general law. It was under the threat of expropriation that the sale took place. It appeared that the purchaser had such influence with the " Quisling " authorities in power that the expropriation would have taken place. The plaintiff Company now asked for a declaration that the Quisling Statute was illegal.

Held: that the sale was invalid. The Statute in question was not in conformity with Article 43 of the Hague Regulations. The promulgation of the Law by the Quisling régime must be treated as a law made by the occupation forces. As the Law was in violation of the Hague Rules it was illegal. Judge Andenaes said (for a unanimous Court) : " The Statute constituted a definite rupture with principles previously followed in Norwegian legislation in this important field of law. . . . The Statute lies obviously far outside the legislative powers of the occupying force as laid down in Article 43 of the Hague Rules. In my opinion it must be characterized as an abuse of right by the forces which then held power in the country."

[Report : *Norsk Rettstidende* (Rt), 1951, p. 1035.]

---

[1] English text from Peaslee, *Constitution of Nations* (1950), vol. II, p. 687.

Case No. 200 **Belligerent Occupation—Legislative Powers of Occupant—Currency Legislation—Decrees Inconsistent with the Law of the Land.**

TSE CHUNG *v.* LEE YAU CHU.

Hong Kong, Supreme Court.
(Gould J.).
December 18, 1951.

THE FACTS.—This case arose out of a contract for the sale of some property during the Japanese occupation of Hong Kong. A deposit of $30,000 was paid. It was provided that should the vendor not complete the contract he should be entitled to discharge his liability by paying the sum of $60,000. In 1943 the Japanese Governor of Hong Kong issued an Order under which transactions in Hong Kong dollars were declared to be illegal except under permit. In 1945 the vendor, in pursuance of an offer previously made, paid into Court the sum of 15,000 Japanese Yen for the purpose of discharging his liability—this, it was alleged, being the equivalent of the sum of $60,000. The purchasers refused to accept the payment. The question which is relevant for the purpose of the present report was whether the vendor could rely on the provisions of Article 494 of the Japanese Civil Code the effect of which, in the present case, was that as the result of the payment and a declaration of trust made thereunder, the debt was deemed to have been cleared.

Held : for the plaintiffs. The Court said :

" I am of the opinion that the bringing into force of the Article was beyond the proper scope of the legislative powers of the Japanese administration. This subject is dealt with in McNair's *Legal Effects of War* (3rd Edition) at 337 :

'. . . the principle is that, the occupant being under a duty to maintain order and to provide for the preservation of the rights of the inhabitants and having a right recognized by international law to impose such regulations and make such changes as may be necessary to secure the safety of his forces and the realization of the legitimate purpose of his occupation, his acts, whether legislative, executive, or judicial, so long as he does not overstep these limits will be recognized by the British Government and by British Courts of law—during and after the war if Great Britain is neutral, after it if Great Britain is belligerent.'

The writer goes on to say that it is difficult to find British judicial authority for this proposition, and after quoting the opinions of writers on International Law, he continues (at page 338) :

' Thus we apprehend that if the enemy were to occupy the Scilly Isles (we refrain from instancing the Channel Islands because they have their own legal system), all the ordinary transactions of private law taking place in accordance with existing English law during the enemy administration, such as contracts, dispositions of movables and immovables, devolution of property by will or upon intestacy, and all normal official transactions such as the collection of ordinary taxes, would, at the end of the occupation, be treated as valid, and all judgments, civil and criminal, given in accordance with English law or with such regulations as the enemy was lawfully entitled to prescribe, would be respected. But if the enemy were to introduce a new system of landholding, for instance, to divide up an estate amongst the tenants and purport to make them freeholders, or a new system of local government, or a new marriage law, or were to disestablish and disendow the Church of England, such measures would not be respected.'

" The Article in question may be a useful and innocuous provision of Japanese peace-time civil law. It is very different, however, when it is introduced into occupied territory with its peculiar problems and its difficulties of competing currencies. Though there was by decree at this time only one legal currency, Hong Kong currency in fact maintained an increasing value and it is of interest to note that according to the scale in the Schedule to the Debtor & Creditor (Occupation Period) Ordinance, the payment into Court of M.Y. 15,000 in February 1945 was equivalent in value to H.K.$240. Had there been a decree or order applying the Article in Hong Kong and limiting its scope in some way, the position might have been different : but, as I have said, the only evidence before me that it was in force at all is that it was being acted upon. Therefore, I must assume that it was not subject to any modification. It follows that it provided a means whereby those persons who were in Hong Kong during the occupation could, if they were so disposed, have settled all their pre-war dollar obligations in military yen irrespective of the natural and frequently unavoidable absence of the creditor. There is no similar provision in the ordinary law of the Colony, and I hold that the change in law was not one necessary for the safety of the occupying forces or the legitimate purposes of the occupation and not one that should be treated as valid and effectual by the Courts of the Colony. It follows that the payment into Court was not a discharge of the defendant's liability by payment."

[Report : *Hong Kong Law Reports*, 35 (1951), p. 143.]

Case No. 201 **Belligerent Occupation—Powers and Duties of Occupant—Validity of Courts Set Up by Occupant—Validity and Effect of Orders, Judgments and Decrees of Occupant's Courts—*Postliminium*—Relevance of International Law—Japanese Judgments and Civil Proceedings Ordinance, 1946—The Law of Malaya.**

RAMZAN AND OTHERS *v.* RAMZAN.

Singapore, High Court.
(Murray-Aynsley C.J.)
March 22, 1951.

THE FACTS.—During the course of the Japanese occupation of Malaya the defendant became the sole surviving trustee of the will of a deceased. In January 1945, he was convicted of the offence of a criminal breach of trust by a Japanese court and sentenced to one year's imprisonment. In May 1945, the Estate and Trust Agencies (1927) Limited was, by consent of all the beneficiaries, appointed by an order of the Japanese Court sole trustee in place of the defendant. This order was subsequently set aside in 1950 under s. 3 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, but, for reasons which are not here material, no other decree was substituted under s. 5 of that Ordinance. Meanwhile the Estates and Trust Agencies Company managed and administered the affairs of the estate. In September 1950 a summons was taken out by the plaintiffs applying for the appointment of the Company as a trustee of the will of the deceased. This summons was later amended by the insertion of a prayer for directions on the question whether the Company was entitled to any remuneration for their past services to the estate of the deceased.

Held: that whilst there was (1) no ground for treating the Japanese decree as a judgment, and (2) no obligation arising from agreement for the estate to pay the Company any remuneration, the benefit derived by the beneficiaries from the activities of the Company created an obligation to pay a reasonable remuneration for the services rendered and an indemnity for expenses incurred by them. " By statute, certain courts were set up for the Straits Settlements and these statutes remained in force during the occupation period. The Japanese courts did not comply with the statutory requirements. There could not by statute be any other courts in the territory comprised within the Straits Settlements. Therefore there could be no [valid judgments given by the Japanese courts]. Nor could a judgment of a purported court in the territory be a foreign judgment." Furthermore, " when territory of a State has been occupied by an enemy and liberated, the extent to which acts of the Occupying Power shall be recognized is a domestic matter for such State".

The Court continued: "In the course of proceedings resulting from this summons it became necessary to consider the position of the . . . Estate and Trust Agencies (1927) Ltd. They were appointed trustees by a decree of the Japanese Court that functioned in the city during the occupation period. The previous trustee had been convicted and sentenced by a Japanese criminal court. His removal was the consequence of that conviction. He was at the time of the decree incapacitated from performing the duties of a trustee by the fact that he was in prison. Ultimately, there was an application for substitution under s. 5 of Ordinance No. 37 of 1946 and also an application under s. 3 to set it aside. It was set aside for reasons which have nothing to do with the applicants, and in consequence no order was made on the application under s. 5. The result of this is that it is now necessary to consider, in the first instance, whether the applicants can claim anything under the Japanese decree, and, if not, can they claim otherwise?

"At the outset, I may mention that the applicants looked after the trust property until the decree was set aside in 1950, and they performed valuable services which ought to be remunerated. Until 1950 no one made any objection. The only difficulty is to find an adequate legal ground for awarding them something.

"I cannot see any ground for treating the Japanese decree as a judgment. By statute certain courts were set up for the Straits Settlements, and these statutes remained in force during the period of the occupation. The Japanese courts did not comply with the statutory requirements. There could not by statute be any other courts in the territory comprised within the Straits Settlements. Therefore there could be no judgments. Nor could a judgment of a purported court in the territory be a foreign judgment.

"Unless an order were to be made under s. 5, a Japanese judgment would be without legal consequences. I do not think that international law has any application. If there is any rule on the subject it would, in all cases, be subject to any relevant statutes. In any event international law has States for its subjects, not individuals, and as such it has no application in matters affecting the rights of individuals *inter se*. To suggest that international law has any application involves acceptance of the proposition that the Government of the Colony [of Malaya] was under an obligation to the Japanese Government to recognize the validity of Japanese acts during the period of the occupation. When territory of a State has been occupied by an enemy and liberated, the extent to which acts of the Occupying Power shall be recognized is a domestic matter for such State. It is true that in certain matters the law laid down

Case No. 201 *Contd.* by courts in such matters has its origin historically in the opinions of writers on international law, but the law so laid down is English law and not international law. The opinions of such writers have no relevance or significance until their opinions are accepted and applied by the courts. And, of course, the courts have no power to give any ruling that conflicts with the statute law. I think, therefore, that the applicants can claim nothing under the Japanese decree. I think that s. 7 is really redundant. But in any event I do not think that the words ' or otherwise ' should be read as *ejusdem generis* with ' set-off or counter claim '. I think that that section would bar the claim of the applicants if it were not barred on more general grounds.

" I should add that a judgment may be valid as a contract though not as a judgment. This may be the case, in some instances, with Japanese judgments. It cannot be applied to the present case, as the trustee could not oppose the decree of the Japanese civil court except on the supposition that the conviction before the Japanese criminal court was wrong. This he could not allege.

" It would be manifestly inequitable if the applicants were to get nothing for their labours and expenditure. Usually when courts find themselves in the position in which I now am, they get out of the difficulty by one or other of two expedients : they discover some kind of a trust, or some kind of what they call an implied contract. The zeal they displayed to do justice has led to such frequent use of these expedients that English law has no rational theory of obligations. On the other hand, English law failed to develop quasi-contract, which is a more rational method of dealing with the problem. There is no question here of a trust, and I think it would be a perversion of facts to find there is any obligation to pay the applicants resulting from the agreement. But it would be wrong to treat the assumption of duties by the applicants as unlawful. Until 1950 no objection was taken to the applicants' continuing to act. I think that in those unusual circumstances the law should be capable of adapting itself to do justice, and I consider that the benefit derived by the beneficiaries from the activities of the applicants created an obligation to give a reasonable remuneration for the services rendered and to indemnify them for expenses incurred. In the absence of agreement the matter must be referred to the Registrar to quantify. . . ."

[Report : (1951) II M.L.R. 88.]

Belligerent Occupation—Legislative and Administrative Measures of Occupant—Currency Issues by Occupant—Validity of Payment—Whether Recognized After Cessation of Occupation—Japanese Occupation of Burma. **Case No. 202**

DOOPLY *v.* CHAN TAIK.

Burma, Supreme Court. June 29, 1950.

THE FACTS.—During the Japanese occupation of Burma, proceedings were instituted to redeem certain property from an equitable mortgage created in 1941, and the plaintiff on March 8, 1945, deposited in Court Japanese military notes in full payment. On the basis of this deposit the City Court of Rangoon on April 23, 1945, made a final decree for redemption. After the reoccupation of Rangoon by forces of the lawful Government, the High Court allowed an appeal by the defendant and held that payment into Court in Japanese military notes did not suffice. The plaintiffs appealed.

Held: that the judgment of the High Court must be affirmed. The Court said:

" [Appellant's counsel] claims that the enemy in occupation of Burma between the years 1942 and 1945 could have imposed on the inhabitants of the country, so long as the occupation lasted, the obligation to recognize the Japanese Military notes at their face value for use as media of exchange and that the appellants, so long as the occupation lasted, could have claimed as against the defendant that these notes which they were depositing in Court were worth their face value. This ingenious contention, however, does not help the appellants to surmount the difficulty inherent in such Japanese Military notes not being lawful money. They were no better than tokens which were given and had value as media of exchange so long as the occupation lasted. A full Bench of the High Court of Judicature in *Ko Maung Tin* v. *U Gon Man* (1947, Ran. 149) held that Japanese Military notes were documents with a value in exchange for goods and had thus a purchasing value. Four of the five Judges held that Japanese Military notes never formed part of the currency system in Burma and were not ' money '. . . . Nothing has been said before us on behalf of the appellants to justify our dissenting from the view held by the Full Bench of the High Court of Judicature. With the reoccupation of Burma by the lawful Government, Japanese Military notes became worthless and were not recognized by the lawful Government as having any value after the reoccupation. If, then, Japanese Military notes were not ' money ' the deposit into the City Court of Rangoon of these notes on the 8th March 1945 cannot, in itself, have the effect of discharging the obligation under the mortgage.

Case No. 202 Contd. "True it is that if following the deposit into Court such deposit had been accepted by the defendant, such acceptance may . . . by reason of section 4 of the Japanese Currency (Evaluation) Act, 1947, have the effect of releasing the plaintiffs from their liability. . . . But we see no justification for extending the rule to cover a deposit into Court. . . .

"It is not relevant to the enquiry that so long as military occupation lasted, the military commander could have by exercise of irresistible force compelled acceptance of military notes at their face value. To contend . . . that the City Court of Rangoon on the 8th March 1945 could not have, without laying itself open to such pains and penalties as were held out by the military ordinance relating to military notes, refused the deposit of such notes in Court is to beg the question. Inherent in the contention is the proposition, which we have rejected, namely, that the military commander could have validly imposed a parallel currency system and equated such currency to the lawful currency of Burma."

[Report: *A.J.*, 45 (1951), p. 387.]

Case No. 203 **Belligerent Occupation—Legislative and Administrative Functions of Occupant—Articles 43, 46 and 53 of Hague Regulations—Sequestration of Assets of Bank by Occupant—Enemy Character of Corporation—Power of Occupant to Issue Currency—Payment of Debts in Occupation Currency.**

HAW PIA *v.* THE CHINA BANKING CORPORATION.

Philippines, Supreme Court. April 9, 1948.

THE FACTS.—This was an action to compel the defendant Bank to cancel its mortgage on certain realty owned by the plaintiff and to deliver the certificate of title to that realty. The plaintiff alleged that her indebtedness to the defendant had been satisfied by payments in Japanese occupation currency, made during the period from October 1, 1942, to August 29, 1944, while the Philippines were occupied by Japanese forces. These payments had been made to the Bank of Taiwan, which had been appointed by the Japanese military authorities in the Philippines as the liquidator of the defendant. The trial Court held that the payment to the Bank of Taiwan had not satisfied the plaintiff's indebtedness because there was no evidence that the defendant had authorized the Bank of Taiwan to accept payment of the debt and because the Bank of Taiwan, as an agency of the Occupying Power, was not authorized under international law to liquidate the business of the defendant. The plaintiff appealed from an order directing the sale of the mortgaged realty if the debt was not paid within ninety days.

Held: that the judgment of the Court below must be reversed and the defendant directed to execute a deed of cancellation of the mortgage. The Japanese military authorities had the right to order liquidation of the defendant Bank as a measure for the sequestration of enemy assets, and this action did not violate the Hague Regulations of 1907. The Japanese, as military occupants, were authorized to issue occupation currency, and payment in such currency to the liquidator of the Bank, the assets of which had been sequestered, constituted a valid discharge of the debt. The Court said:

" The appellant's assignments of error may be reduced to two, to wit: First, whether or not the Japanese Military Administration had authority to order the liquidation or winding up of the business of defendant-appellee China Banking Corporation, and to appoint the Bank of Taiwan liquidator authorized as such to accept the payment by the plaintiff-appellant's to said defendant-appellee; and second, whether or not such payment by the plaintiff-appellant has extinguished her obligation to said defendant-appellee.

" (1) As to the first question, we are of the considered opinion, and therefore hold, that the Japanese military authorities had power, under the international law, to order the liquidation of the China Banking Corporation and to appoint and authorize the Bank of Taiwan as liquidator to accept the payment in question, because such liquidation is not a confiscation of the properties of the bank appellee, but a mere sequestration of its assets which required the liquidation or winding up of the business of said bank. All the arguments to the contrary in support of the decision appealed from are predicated upon the erroneous assumption that the liquidation or winding up of the affairs of the China Banking Corporation, in order to determine its liabilities and net assets to be sequestrated or controlled, was an act of confiscation or appropriation of private property contrary to Article 46, section III of the Hague Regulations of 1907.

" The provisions of the Hague Regulations, section III, on Military Authority over Hostile Territory, which is a part of the Hague Convention respecting the laws and customs of war on land, are intended to serve as a general rule of conduct for the belligerents in their relations with each other and with the inhabitants, but as it had not been found possible then to concert regulations covering all the circumstances which occur in practice, and on the other hand it could not have been intended by the High Contracting Parties that the unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders, it was agreed that ' Until a complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that in cases not included in the Regulations adopted by them, the

Case No. 203 *Contd.*

inhabitants and the belligerents remain under the protection and the rule of the principles of international law, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.'

" Before the Hague Convention, it was the usage or practice to allow or permit the confiscation or appropriation by the belligerent occupant not only of public but also of private property of the enemy in a territory occupied by the belligerent hostile army ; and as such usage or practice was allowed, *a fortiori*, any other act short of confiscation was necessarily permitted. Section III of the Hague Regulations only prohibits the confiscation of private property by order of the military authorities (Article 46), and pillage or stealing and thievery thereof by individuals (Article 47) ; and as regards public property, Article 53 provides that cash funds, and property liable to requisition and all other movable property belonging to the State susceptible of military use or operation, may be confiscated or taken possession of as a booty and utilized for the benefit of the invader's government (II Oppenheim, 8th ed. section 137 ; 320 & 321, War Department ; Basic Field Manual, Rules of Land Warfare FM 27–10). The belligerents in their effort to control enemy property within their jurisdiction or in territories occupied by their armed forces in order to avoid their use in aid of the enemy and to increase their own resources, after the Hague Convention and specially during the first World War, had to resort to such measures of prevention which do not amount to a straight confiscation, as freezing, blocking, placing under custody and sequestrating the enemy private property. Such acts are recognized as not repugnant to the provisions of Article 46 or any other article of the Hague Regulations by well-known writers on International Law, and are authorized in the Army and Navy Manual of Military Government and Civil Affairs not only of the United States, but also in similar manuals of Army and Navy of other civilized countries, as well as in the Trading with the Enemy Acts of said countries.

" Hyde in his International Law chiefly as interpreted and applied by the United States, Vol. 3, 6th ed., p. 1727, has the following to say :

' In examining the efforts of a belligerent to control in various ways property within its domain that has such a connection with nationals of the enemy that it may be fairly regarded as enemy property, it is important to inquire whether the attempt is made to appropriate property without compensation, divesting him not only of title, but also of any right or interest in what is taken, without prospect of reimbursement, or whether those efforts constitute an assumption of control which, regardless of any transfer of title, is not designed to produce such a deprivation. The character of the belligerent acts in the two situations is not identical. To refer to both as confiscatory is not productive of clearness of thought, unless a loose and broad signification be attached to the term " confiscation ". The point to be noted is that a belligerent may in fact deprive an alien enemy owner of property by processes that are not essentially confiscatory, even though the taking and retention may cause him severe loss and hardship. Recourse to such non-confiscatory retentions or deprivations has marked the conduct of belligerents since the beginning of the World War in 1914. They may perhaps be appropriately referred to as sequestrations. The propriety of what they have involved is, therefore, hardly discernible by reference to objections directed against confiscatory action as such, and must be tested by other means or standards.

' A belligerent may fairly endeavor to prevent enemy property of any kind within its territory (or elsewhere within its reach) from being so employed as to afford direct military aid to its foe. Measures of prevention may, in a particular case, assume a confiscatory aspect. In such a situation the question may arise whether those measures are, nevertheless, excusable. It is believed that they may be, and that they are not invariably unlawful despite the absence of efforts to compensate the owners.'

" And in the footnote of the same page, said author adds :

' This analysis differs sharply from that of those who would regard almost all uncompensated deprivations of property as essentially confiscatory, and as, therefore, internationally illegal because of the further assumption or conclusion that confiscatory action must inevitably be so regarded. Belligerent States have not, however, generally acted on such a theory. They have in fact proceeded, especially since 1914, to exercise varying degrees of control over vast amounts of enemy private property by strictly non-confiscatory processes from which they have felt no sense of legal obligation to abstain. In so doing they have been creative of relatively fresh practices which logic has ordained and war-terminating treaties have sanctioned. Thus it happens that proper estimation of the place of confiscation of enemy private property in the law of nations has become of less importance than formerly, because both of the reluctance of States—and notably of the United States to have recourse to it, and of their preference for non-confiscatory measures exemplified in sequestrations as a desirable and sufficient means of utilizing such property.'

" And Oppenheim in his International Law, Vol. 2, 6th ed., by Lauterpacht, says :

' But the desire to eliminate the financial and commercial influence of the enemy, and other motives, presently led in most States to exceptional war measures against the businesses and property of enemies, which, though not confiscation, inflicted great loss and injury. Sometimes these measures stopped short of divesting the enemy ownership of the property ; but in other cases the businesses or property were liquidated, and were represented at the close of hostilities by nothing else than the proceeds of their realization, often enough out of all proportion to their value. In the

Case No. 203 *Contd.*

Trading with the Enemy Act, 1939, provision was made for the appointment of custodians of enemy property in order to prevent the payment of money to enemies and to preserve enemy property in contemplation of arrangements to be made at the conclusion of peace.

'The readjustment of rights of private property on land was provided for by the Treaties of Peace. The general principles underlying their complicated arrangements were that the validity of all completed war measures was reciprocally confirmed ; but that while uncompleted liquidations on the territories of the Central Powers were to be discontinued, and the subjects of the victorious Powers were to receive compensation for the loss or damage inflicted on their property by the emergency war measures, the property of subjects of the vanquished Powers on the territories of the Allied and Associated Powers might be retained and liquidated, and the owner was to look for compensation to his own State. The proceeds of the realization of such property were not to be handed over to him, or to his State, but were to be credited to his State as a payment on account of the sums payable by it under the treaties.'

" In paragraph 143 (p. 313) of the same work, Oppenheim states that ' Private personal property which does not consist of war materials or means of transport serviceable for military operations may not be as a rule seized '. It is obvious that the word ' seized ' used therein signifies ' confiscated ' in view of the above quoted paragraphs, and therefore when Oppenheim says, in the footnote to said passage, ' Nor may the occupant liquidate the business of enemy subjects in occupied territories ', he means ' confiscate ' by the word ' liquidate '.

" Ernest K. Feildchenfeld [*sic*] in his ' The International Economic Law of Belligerent Occupation (1942) ' supports the foregoing conclusion of Hyde, when he says that ' According to Article 46 of the Hague Regulations, private property must be respected and cannot be confiscated. This rule affords protection against the loss of property, through outright confiscation, but not against losses under lawful requisition, contribution, *seizure*, fines, taxes, and expropriation ' (Par. 208, p. 51). And later on he adds : ' A complete nationalization of a corporation for the benefit of the occupant could not be anything but a permanent measure involving final effects beyond the duration of the occupation. There is no military need for it because the same practical results can be achieved by temporary *sequestration* ' (par. 385, p. 107).

" Martin Domke in his Trading with the Enemy in World War II, pp. 4 and 5, speaking of Warfare on Economic and Military Fronts, says that ' Freezing Control is but one phase of the present war effort ; it is but one weapon in the total war which is now being waged on both economic and military fronts. Coupled with Freezing Control as a part of this nation's program of economic warfare are to be found export control, the promulgation of a Black List, censorship, seizure of enemy-owned property, and financial and lend-lease aid to allied and friendly nations. As to Japan, no official information is available as yet on steps taken by the Japanese Government. As a Commentary of April 11, 1942, points out, the Japanese Trading with the Enemy legislation enacted during the last war against Germany might throw some light on the views adopted by Japan in this matter.'

" The sequestration or liquidation of enemy banks in occupied territories is authorized expressly by the United States Army and Navy Manual of Military Government and Civil Affairs F. M. 2710 OPNAV 50–E–3, which, mandatory and controlling upon the theatre commanders of the U.S. forces in said territories, provides in its paragraph 12 the following :

> ' *Functions of Civil Affairs Officers.*—In the occupation of such territories for a considerable period of time, the civil affairs officers will in most cases be concerned with the following and other activities :
>
> ' 1. MONEY AND BANKING.—Closing, if necessary and guarding of banks, bank funds, safe deposit boxes, securities and records ; providing interim banking and credit needs ; *liquidation* ; *reorganization, and reopening of banks at appropriate times* ; regulation and supervision of credit cooperatives and other financial agencies and organizations ; execution of policies on currency fixed by higher authority, such as the designation of types of currency to be used and rates of exchange supervision of the issue and use of all types of money and credit ; declaration of debt moratoria ; prevention of financial transactions with enemy occupied territory.'

The civil affairs officers are concerned, that is, entrusted with the performance of the functions enumerated above, when so directed by the chief commander of the occupant military forces.

" Not only the United States Army and Navy Manual of Military Government and Civil Affairs but similar manuals of other countries authorize the liquidation or impounding of the assets of enemy banks or the freezing, blocking and impounding of enemy properties in the occupied hostile territories without violating Article 46 or other articles of the Hague Regulations. They do not amount to an outright confiscation of private property, and were put into effect by the Allied Army in the occupied hostile territories in Europe during World War II.

" The Combined Chiefs of Staff, in their Directive of May 31, 1943, on Military Government in Sicily, Italy, addressed to the Supreme Allied Commander, Mediterranean Theater, ordered : ' (*h*) An Allied Military Financial Agency under the control of the Military Government shall be established with such sub-agencies as considered necessary, (*i*) Military authorities on occupying an area shall immediately take the following steps : " (1) All financial institutions and banks shall be closed and put under the custody of the military forces ", (2) a general moratorium shall be declared. (*j*) . . . all papers of value, foreign securities,

Case No. 203 *Contd.*

gold and foreign currencies shall be impounded with receipts granted to recognized owners. (*k*) The Allied Military Financial Agency or any appointed agency by the MG will take into immediate custody all foreign securities and currencies, holding of gold, national funds and holdings of Fascist organizations for deposit.' (Appendix on American Military Government, its Organization and Policies, by Hajo Holborn, 1947, pp. 116, 117.)

" The Combined Directive of April 28, 1944, for Military Government in Germany Prior to Defeat or Surrender, provided that the Allied Forces ' Upon entering the area of Germany will take the following steps and put into effect only such further financial measures as they deem to be necessary from a strict military standpoint. (*b*) Banks should be placed under such control as deemed necessary by them in order that adequate facilities or military needs may be provided and to insure that instructions and regulations issued by military authorities will be fully complied with. (*c*) Pending determination of future disposition, all gold, foreign currencies, foreign securities, accounts in financial institutions, credits, valuable papers, and all similar assets held by or on behalf of the following, will be impounded or blocked and will be used or otherwise dealt with only as permitted under licenses or other instructions which you may issue : (1) German national state, provincial and local governments and agencies and instrumentalities thereof. . . . (4) Nazi party organizations including the party formations, affiliates and supervised associations, and the official, leading members and supporters thereof ; and (5) Persons under detention or other types of custody by Allied Military authorities and other persons whose activities are hostile to the interests of military government ' (Holborn, *supra*, p. 141).

" In the Allied Directive of June 27, 1945, to the Commander in Chief of the United States forces of occupation regarding the military government of Austria, the Commanding General of the United States forces of occupation in Austria, serving as United States member of the Allied Council of the Allied Commission for Austria, was authorized, subject to agreed policies of the Allied Council, to close banks, insurance companies, and other financial institutions for a period long enough to introduce satisfactory control to ascertain their cash position and to issue instructions for the determination of accounts and assets to be blocked under paragraph 55 which authorized him to impound or block all gold, silver, currencies, securities accounts in financial institutions, credits, valuable papers, and all other assets falling within the following categories : a. Property owned or controlled, directly or indirectly, in whole or in part, by any of the following : (1) the governments, nationals or residents of the German Reich, Italy, Bulgaria, Rumania, Hungary, Finland and Japan, including those of territories occupied by them ; (3) the Nazi Party, its formations, affiliated associations and supervised organizations, its officials, leading members and supporters ; (4) all organizations, clubs or other associations prohibited or dissolved by military government ; (5) absentee owners, including United Nations and neutral governments ; (7) persons subject to arrest under the provisions of paragraph 7, and all other persons specified by military government by inclusion in lists or otherwise (Holborn, *supra*, p. 192).

" On the other hand, the provisions of the Trading with the Enemy Acts enacted by the United States and almost all the principal nations since the first World War, including England, Germany, France, and other European countries, as well as Japan, confirms that the assets of enemy corporations, specially banks incorporated under the laws of the country at war with the occupant and doing business in the occupied territory, may be legally sequestrated, and the business thereof wound up or liquidated. Such sequestration or seizure of properties is not an act for the confiscation of enemy property, but for the conservation of it, subject to further disposition by treaty between the belligerents at the end of the war. Section 12 of the Trading with the Enemy Act of the United States provides that ' after the end of the war any claim of enemy or ally of an enemy to any money or other property received and held by the Alien Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct '.

" The purpose of such sequestration is well expounded in the Annual Report of the Office of the Alien Custodian for a period from March 11, 1943, to June 30, 1943. ' In the absence of effective measures of control, enemy-owned property can be used to further the interest of the enemy and to impede our own war effort. All enemy-controlled assets can be used to finance propaganda, espionage, and sabotage in this country or in countries friendly to our cause. They can be used to acquire stocks of strategic materials and supplies. . . [of] use to the enemy, they will be diverted from our own war effort.'

" The national safety requires the prohibition of all unlicensed communication, direct or indirect, with enemy and enemy-occupied territories. To the extent that this prohibition is effective, the residents of such territory are prevented from exercising the rights and responsibilities of ownership over property located in the United States. Meanwhile, decisions affecting the utilization of such property must be made and carried out. Houses must be maintained and rents collected ; payments of principal and interest on mortgages must be made for the account of foreign debtors and foreign creditors ; stranded stocks of material and equipment must be sold ; patents must be licensed, *business enterprises must be operated*

Case No. 203 *Contd.*

or liquidated, and foreign interest must be represented in court actions. The number of decisions to be made in connection with property is in fact multiplied by a state of war, which requires that productive resources be shifted from one use to another so as to conform with the requirements of a war economy.

" The defendant-appellee, China Banking Corporation, comes within the meaning of the word ' enemy ' as used in the Trading with the Enemy Acts of civilized countries, because not only was it controlled by Japan's enemies, but it was, besides, incorporated under the laws of a country with which Japan was at war.

" Section 2 (1) of the Trading with the Enemy Act of Great Britain provides that the expression ' enemy ' means : any body of persons (whether corporate or incorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy. The control test has also been expressly adopted in the French Trading with the Enemy Act. The Italian Act regards as enemies ' legal persons when enemy subjects have any prevalent interests whatever in them '. The Decree of the Dutch Government-in-exile of June 7, 1940, also adopted the control test by including in the term enemy subjects ' legal persons in which interests of an enemy state or enemy subjects are predominantly involved '. (Domke, Trading with the Enemy Act, pp. 127–130.)

" In the United States, the Trading with the Enemy Act has not adopted the control theory. But section 2-*a* of the said Act says that the word enemy shall be deemed to mean any ' corporation incorporated within such territory of any nation with which the United States is at war '. And the same definition is given to the word ' enemy ' by the Trading with the Enemy Act of the above named countries. The British Act in section 2 (1) defines as enemy ' any body of persons constituted or incorporated in or under the laws of a state at war with his Majesty ', it being immaterial that they are under the control of allied or neutral stockholders. Similarly the French Act regards as enemies, corporations incorporated in conformity with the laws of an enemy state. The decree of the Dutch Government-in-exile on June 7, 1940, considers as enemies legal persons ' organized or existing according to or governed by the law of an enemy state '. The German Act of January 15, 1940, I section 3 (1) 3, deems enemies all corporations ' the original legal personality of which is based on the laws of an enemy state '. The Italian Act of 1938, section 5, regards corporations as enemies if they are of enemy nationality under the law of the enemy state. So too the Japanese Act, Chapter 1, No. 25, deems enemies ' all corporations belonging to enemy countries '. (See Martin Domke, Trading with the Enemy Act in World War II, pp. 120–122.)

" Section 3–A of the Trading with the Enemy Act of the

United Kingdom of September 5, 1939, as amended up to April 1, 1943, provides that ' Where any business is being carried on in the United Kingdom by, on behalf of, or under the direction of, persons all or any of whom are enemies or enemy subjects or appear to the Board of Trade to be associated with enemies, the Board of Trade may, if they think it expedient so to do, make . . .,' (*b*) an order (hereinafter in this section referred to as a winding up order) *requiring the business to be wound up* ; ' and section 14(*c*) of the same Act (that obviously makes it applicable to enemy territories occupied by the United Kingdom's armed forces) provides that ' His Majesty may by Order in Council direct that the provisions of this Act other than this section shall extend, with such exceptions, adaptations and modifications, if any, as may be prescribed by or under the order . . . (to the extent of His Majesty's jurisdiction therein) *to any other country or territory being a foreign country or territory, in which for the time being His Majesty has jurisdiction*.' (The Trading with the Enemy Act in World War II, p. 481, by Martin Domke.)

" Section 5 (*b*) of the Trading with the Enemy Act of the United States provides that ' during the time of war or during any period in which national emergencies are declared by the President, the President may under any agency that he may designate or otherwise and under such rule and regulation as he may prescribe ', and ' any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe, such interest or property shall be *held, used, administered, liquidated*, etc.' and section 6 (*e*) of the same Act provides that ' any payment, . . . of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same . . . and shall, in case of payment to the alien property custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation . . . *with like effect* as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee '.

" It is evident that the Trading with the Enemy Act of the United States, like that of the United Kingdom of Great Britain above quoted, and those of other countries, may be applied and enforced in a hostile territory occupied by the United States armed forces, because section 2 of said Act provides ' That the words " United States ", as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States

Case No. 203 Contd.

or *occupied by the military or naval forces thereof'*. After the liberation of the Philippines during World War II, properties belonging to Japanese Nationals located in this country were taken possession of by the Alien Property Custodian appointed by the President of the United States under the Trading with the Enemy Act, because, although the Philippines was not a territory or within the jurisdiction or national domain of the United States, it was then occupied by the military and naval forces thereof.

" Of course it is obvious that the obligations assumed by the United States, in applying the Trading with the Enemy Act of the United States to properties within her national domain, is different and distinct from those arising from the application thereof to enemy properties located within the hostile territory occupied by her armed forces. In the first case, Congress is untramelled and free to authorize the seizure, use, or appropriation of such properties without any compensation to the owners, for although section 2 of the Trading with the Enemy Act provides that ' at the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury shall be settled by Congress ', the owners of the properties seized within the national domain of the United States are not entitled to demand its release or compensation for its seizure, but what would ultimately come back to them, might be secured, not as a matter of right, but as a matter either of grace to the vanquished or exacted by the victor, for the case is to be governed by the domestic laws of the United States, and not by the Hague Regulations or International law (*U.S.* v. *Chemical Foundation, Inc.*, 272 U.S. 1 ; *United States* v. *S. S. White Dental Manufacturing Company*, 274 U.S., 402).[1] While in the latter case, when properties are sequestrated in a hostile occupied territory by the armed forces of the United States, Congress can not legally refuse to credit the compensation for them to the States of the owners as payment on account of the sums payable by said States under treaties, and the owners have to look for compensation to their States, otherwise, they would violate Article 46 of the Hague Regulations or their pledge of good faith implied in the act of sequestrating or taking control of such properties.

" It is to be presumed that Japan, in sequestrating and liquidating the China Banking Corporation, must have acted in accordance, either with her own Manual of the Army and Navy and Civil Affairs, or with her Trading with the Enemy Act, and even if not, it being permitted to the Allied Nations, specially the United States and England, to sequestrate, impound, and block enemy properties found within their own domain or in enemy territories occupied during the war by their armed forces, and it being not contrary to the Hague Regulations or international law, Japan had also the right to do the same in the Philippines by virtue of the international law principle that 'what is permitted to one belligerent is also allowed to the other'.

---

[1] See *Annual Digest*, 1927–1928, Case No. 367.

"Taking into consideration the acts of the Japanese Military Administration in treating the private properties of the so-called enemy banks, it appears evident that Japan did not intend to confiscate or appropriate the assets of said banks or the debts due them from their debtors, and thus violate Article 46 or any other article of the Hague Regulations. It is true that, as to private personal properties of the enemy, freezing, blocking or impounding thereof is sufficient for the purpose of preventing their being used in aid of the enemy; but with regard to the funds of commercial banks like the so-called enemy banks, it was impossible or impracticable to attain the purpose for which the freezing, blocking and impounding are intended, without liquidating the said banks and collecting the loans given by them to hundreds if not thousands of persons scattered over the Islands. Without doing so, their assets or money loaned to so many persons can not properly be impounded or blocked, in order to prevent their being used in aid to the enemy through the intervention of their very debtors, and successfully wage economic as well as military war.

"That the liquidation or winding up of the business of the China Banking Corporation and other enemy banks did not constitute a confiscation or appropriation of their properties or of the debts due them from their debtors, but a mere sequestration of their assets during the duration of the war for the purposes already stated, is evidenced conclusively by the following uncontroverted facts set forth in the briefs of both parties and *amici curiae*:

"(1) Out of the sum of about ₱34,000,000 collected from the debtors by the liquidator Bank of Taiwan, the latter paid out to the depositors or creditors of the same Bank about ₱9,000,000; and it is common sense that this last amount should not have been disbursed or taken out of the said amount of about ₱34,000,000 had it been the intention of the Japanese Military Administration to confiscate this amount collected by the Bank of Taiwan.

"(2) The members of Chinese Associations were permitted to withdraw from their deposits with the China Banking Corporation a considerable amount of money which was paid out of the sum collected from the debtors of said bank, in order that they may pay the contribution legally exacted from them by the military occupant in accordance with Article 51 of the Hague Regulations. And this showed the intention of the belligerent occupant not to confiscate the bank's assets and to

Case No. 203 *Contd.*

act, at least in this respect, in accordance with said Regulations; because otherwise the Japanese Military Administration could have properly required the Chinese to pay the contribution out of their own funds, without diminishing or reducing the amounts collected by the Bank of Taiwan from the debtors of the China Bank.

" (3) The collection of the aforementioned debts from the bank's debtors, as well as the payment of withdrawals by the depositors, were regularly entered into the books of said Banks, so that after liberation they could easily determine the respective amounts and the persons who had made the payments, which enabled all said banks to reopen and continue their business; and the regular keeping of said books would have been unnecessary or useless, were it the intention of the military occupant to close definitely the enemy banks and appropriate all their resources.

" (4) There was absolutely no reason for confiscating the funds of the banks collected from their debtors, because by sequestrating or impounding their assets or funds after the latter had been collected from their debtors, the principal purpose of preventing the possible use of the funds of the banks in aid of Japan's enemy was completely accomplished. Absolutely no other benefit could be derived by Japan from confiscating or appropriating the payments made in *Japanese war military notes* to the enemy banks by their debtors, because the Japanese Government could have them at will without cost, except that of the ink, paper and labor necessary for printing and issuing them.

" (5) The annual report, 31st December, 1945, of the Chartered Bank of India, Australia & China (pp. 11–12), which had a branch in Manila liquidated by Japanese Military authorities as one of the enemy banks, clearly shows that the liquidation of said branch was a mere sequestration, impounding or control of its assets, and not a confiscation or appropriation thereof during the occupation by the Japanese. It says that during the enemy occupation the cash balance of our Branches *were seized, their assets realized* and *repayment of varying amounts, but up to 100 per cent in one Branch at least, made to depositors.* Said report reads, in its pertinent part, as follows:

> ' I informed you, when commenting upon the Balance sheet figures for the year ending 31st December, 1942, that we had reason to believe that accounts of some of our occupied Branches had been partly or wholly liquidated, and that the liquidation of such accounts would ultimately bring about shrinkage in both Assets and Liabilities in the Balance Sheet figures. The information now in our possession and the various changes in the Balance Sheet figures to which I have referred above, confirm *the correctness of this statement,* for during the enemy occupation the cash balances of our Branches

were seized, *their assets realized* where possible, and *repayment of varying amounts, but up to 100 per cent in one Branch at least, made to depositors.* Even so, the business of the offices of the Bank which remained under our own control throughout the war has steadily increased and has offset to a great extent decreases *brought* about by the *partial liquidation of Branches which were in Japanese control.*' (Italics ours.)

"1. It is obvious that the fact that Japanese Military authorities failed to pay the enemy banks the balance of the money collected by the Bank of Taiwan from the debtors of said banks, did not and could not change the sequestration or impounding by them of the bank's assets during the war, into an outright confiscation or appropriation thereof. Aside from the fact that it was physically impossible for the Japanese Military authorities to do so because they were forcibly driven out of the Philippines or annihilated by the forces of liberation, following the readjustment of rights of private property on land seized by the enemy provided by the Treaty of Versailles and other peace treaties entered into at the close of the first World War, the general principles underlying such arrangements are that the owners of properties seized, sequestrated or impounded who are nationals of the victorious belligerent are entitled to receive compensation for the loss or damage inflicted on their property by the emergency war measures taken by the enemy, through their respective States or Governments who may officially intervene and demand the payment of the claim on behalf of their nationals (VI Hackworth Digest of International Law, pages 232, 233; II Oppenheim, sixth edition, page 263). Naturally, as the Japanese war notes were issued as legal tender for payment of all kinds at par with the Philippine peso, by the Imperial Japanese Government, which in its proclamations of January 3, 1942, and February 1, 1942, 'takes full responsibility for their usage having the correct amount to back them up' (*See* said Proclamations and their official explanation, O. T. IMA Vol., 1, pp. 39, 40), Japan is bound to indemnify the aggrieved banks for the loss or damage on their property, in terms of Philippine pesos or U.S. dollars at the rate of one dollar for two pesos.

"2. The second question is, we may say, corollary of the first. It having been shown above that the Japanese Military Forces had power to sequestrate and impound the assets or funds of the China Banking Corporation, and for that purpose to liquidate it by collecting the debts due to said bank from its debtors, and paying its creditors, and therefore to appoint the Bank of Taiwan as liquidator with the consequent authority to make the collection, it follows evidently that the payments by the debtors to the Bank of Taiwan of their debts to the China Banking Corporation have extinguished their obligation to the latter. Said payments were made to a person, the Bank of

Case No. 203 *Contd.*

Taiwan, authorized to receive them in the name of the bank creditor under Article 1162 of the Civil Code. Because it is evident the words ' a person authorized to receive it ', as used therein, means not only a person authorized by the same creditor, but also a person authorized by law to do so, such as guardian, executor or administrator of estate of a deceased, and assignee or liquidator of a partnership or corporation, as well as any other who may be authorized to do so by law (Manresa, Civil Code, 4th ed., p. 254).

" The fact that the money with which the debts have been paid were Japanese war notes does not affect the validity of the payments. The provision of Article 1170 of our Civil Code to the effect that ' payment of debts of money must be made in the specie stipulated and if it is not possible to deliver such specie in silver or gold coins which is a legal tender ', is not applicable to the present case, because the contract between the parties was to pay Philippine pesos and not some specifically defined species of money. The Philippine peso and half-pesos including the Philippine Treasury Certificate was and is the legal tender in the Philippines under section 612 of the Administrative Code, as amended by Act No. 4199. As well stated by the Supreme Court of the United States in *Knox* v. *Lee and Parker* (*Legal Tender Cases*, 12 Wall, 457–681 ; 20 Law. ed., 287). ' The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals, but neither the expectation of one party to the contract, respecting its fruits, nor the anticipation of the other, constitutes its obligation. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it. *Aspdin* v. *Austin*, 5 Ad. & Bl. (N. S.) 671 ; *Dunn* v. *Sayles*, Ibid. 685 ; *Coffin* v. *Landis*, 46 Pa. 426. Were it not so, the expectation of results would be always equivalent to binding engagement that they should follow. But the obligation of contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. If there is anything settled by decision it is this, and we do not understand it to be controverted.' (*Knox* v. *Exchange Bank of Virginia*, 12 Wall. 457 ; 20 U.S. Supreme Court Reports, 20 L. Ed., 287, 311.) In said case it was held that the Legal Tender Acts of Congress which made the treasury notes legal tender for payment of debts contracted before and after their passage were not inappropriate for carrying into execution the legitimate purpose of the Government. And this Court, in *Rogers* v. *Smith Bell* (10 Phil. 319), held that ' A debt of 12,000 pesos created in 1876 can now (1908) be paid by 12,000 of the Philippine pesos authorized by the Act of Congress of March 2, 1903, although at the time the loan was made which created the debt, the creditor delivered to the debtor 12,000 pesos in gold coin '.

"The power of the military governments established in occupied enemy territory to issue military currency in the exercise of their governmental power has never been seriously questioned. Such power is based, not only on the occupant's general power to maintain law and order recognized in article 43 of the Hague Regulations (Feilchenfeld says in his treatise on International Economic Law of Belligerent Occupation, paragraph 6), but on military necessity as shown by the history of the use of money or currency in wars.

"As early as the year 1122, during the siege of Tyre, Doge Micheli paid his troops in leather money which he promised to redeem when he returned to Venice (Del Mar, Money and Civilization, 26), and when Frederick II besieged Milan he also used leather money to pay his troops, as well as in payment of wages (id. 33). When the French forces occupied the Ruhr in 1923, they finished the printing of some Reichsbank notes in process and issued them. (Nussbaum, Money in the Law, note 6, 158–59.) The British during the Boer War issued receipts for requisitioned goods and made such receipts readily negotiable, an arrangement very similar to the issuance of currency (Spaight, War Rights on Land, 396). During the American Revolution, the Continental Congress issued currency even before the issuance of the Declaration of Independence, when the territory controlled by Congress was held in military occupation against the then legitimate government. (Dewey, Financial History of the United States, 37–38; Morrison and Commager, Growth of the American Republic, 207; Nussbaum, op. cit. *supra* note 6, 172–173.) The Confederacy issued its own currency in Confederate territory (*Thorington* v. *Smith*, 8 Wall. 1) and also in northern areas occupied from time to time during the war. (Spaight, op. cit. *supra*, note 19, 392.) The Japanese issued special occupation currency in Korea and Manchuria during the Russo-Japanese War of 1905. (Takahashi, International Law Applied to the Russo-Japanese War, 1908, 260–261; Spaight, op. cit. note 19, 397; Ariga, La Guerre russo-japonaise, 1908, 450 *et seq.*) The British also issued currency notes redeemable in Sterling in London at a fixed rate of exchange, in their occupation of Archangel during and after the first World War. (White, Currency of the Great War, 66; League of Nations, Currency after the War, 100.)

"During the World War II, the Germans had been using a variety of occupation currencies as legal tenders on a large scale, the currency initially used in most occupied areas being the Reichskreditkasse mark, a paper currency printed in German and denominated in German monetary units, which circulated side by side with the local currency at decreased rates of exchange. And the Allies have introduced notes as legal currency in Sicily, Germany and Austria. The Combined Directive of the combined Chiefs of Staff to the Supreme Allied

Case No. 203 *Contd.* Commander issued on June 24, 1943, directed that the task forces of the United States will use, besides regular U.S. coins, yellow seal dollars, and the forces of Great Britain will use besides British coins, British Military Notes (BMN), to supplement the local lire currency then in use (Holborn, American Military Government, 1947, pp. 115, 116). The Combined Directive for Military Government in Germany, prior to defeat or surrender, of April 28, 1944, directed the United States, British and other Allied forces to use Allied military mark and Reichsmark currency in circulation in Germany as legal tender and the Allied Military Marks will be interchangeable with the Reichsmark currency at the rate of Allied Mark for Reichsmark; and that in the event adequate supplies of them were not available, the United States forces will use yellow seal dollars and the British forces will use British Military Authority (BMN) notes. (Holborn, op. cit. *supra*, p. 140.) And the American Directive on the Military Government of Austria of June 27, 1945, ordered that the United States forces and other Allied forces within Austria will use only Allied Military Schillings for pay of troops and other military requirements, declaring them legal tender in Austria interchangeably with Reichsmarks at a rate of one Allied military schilling for one Reichsmark. (Holborn, op. cit. *supra*, p. 192.)

" In the above cited case of *Thorington* v. *Smith*, the Supreme Court of the United States said :

> '. . . While the war lasted, however, they had a certain contingent value, and were used as money in nearly all business transactions of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistible force.
>
> ' It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it has been issued by a foreign government, temporarily occupying a part of the territory of the United States.'

" According to Feilchenfeld in his book ' The International Economic Law of Belligerent Occupation', the occupant in exercising his powers in regard to money and currency, may adopt one of the following methods according to circumstances : (1) When the coverage of the currency of the territory occupied has become inadequate as found in several Balkan countries during the War of 1914–18, and ' the local currency continues to be used, an occupant may reorganize the national currency by appropriate methods, such as the creation of new types and supplies of coverage ' (paragraph 272). (2) The occupant may, and not infrequently [does], use his own currency, in the occupied region. But this method may be found inconvenient if the coverage for their national currency had already become inadequate, and for that reason authorities are afraid of exposing it to additional strain, and for that reason an occupant may not replace the local currency by his own currency for all currency for all purposes, and enforce its use not only for his own payments but also for payments among inhabitants (paragraph 285). (3) Where the regional currency has become inadequate and it is deemed inadvisable by the occupant to expose his own currency to further strain, new types of money may be created by the occupant. Such new currency may have a new name and may be issued by institution created for that purpose (paragraph 296). This last method was the one adopted by Japan in this country, because the coverage of the Philippine Treasury Certificate of the territory occupied had become inadequate, for most if not all the said coverage have been taken to the United States and many millions of silver pesos were buried or thrown into the sea near Corregidor, and Japan did not want to use her national currency, and expose it to additional strains.

" But be that as it may, whatever might have been the intrinsic or extrinsic worth of the Japanese war-notes which the Bank of Taiwan has received as full satisfaction of the obligations of the appellee's debtors to it, is of no consequence in the present case. As we have already stated, the Japanese war-notes were issued as legal tender at par with the Philippine peso, and guaranteed by the Japanese Government ' which takes full responsibility for their usage having the correct amount to back them up' (Proclamation of January 3, 1942). Now that the outcome of the war has turned against Japan, the enemy banks have the right to demand from Japan, through their States or Government, payments or compensation in Philippine pesos or U.S. dollars as the case may be, for the loss or damage inflicted on the property by the emergency war measure taken by the enemy. If Japan had won the war or were the victor, the property or money of said banks sequestrated or impounded by her might be retained by Japan and credited to the respective State of which the owners of said banks were nationals, as a payment on account of the sums payable by them as indemnity under the treaties, and the said owners were to look for compensation in Philippine pesos or U.S. dollars to their respective States. (Treaty of Versailles and other peace treaties entered [into] at the close of the first world war ; VI Hackworth Digest of International Law, p. 232.) And if they cannot get any or sufficient compensation either from the enemy or from their States, because of their insolvency or impossibility to pay, they have naturally to suffer, as everybody else, the losses incident to all wars."

Two Judges concurred in separate opinions.

[Reports : 45 Off. Gaz., Supp. No. 9, 229 (1949) ; *Philippine Law Journal*, 23 (1948), p. 575 ; *Decision Law Journal*, 4 (1948), p. 274.]

Case No. 203 *Contd.*

Hilado J., with whom two other members of the Court concurred, dissented on the following grounds :

The liquidation of enemy banks by the Japanese occupation authorities violated Articles 46, 47 and 53 of the Hague Regulations of 1907 and was therefore unlawful. While banking is a public function and thus subject to regulation by the Occupant, the power of regulation cannot be used to effect what is actually confiscation or pillage. Historically, even central banks have been treated as private institutions by Occupying Powers.

Even if it be assumed that there is a right to liquidate enemy banks, their liquidation must not annul the substantive rights of the banks and of their pre-war debtors. The Occupant had no right to alter the provision of an agreement between the plaintiff and the defendant bank calling for payment in Philippine currency. Since both Japanese occupation currency and Philippine pesos were allowed to circulate during the occupation, it cannot be said that anyone was required to pay existing debts in occupation currency. A debtor has the right to pay his debt in the same currency as he borrowed.

Japanese occupation currency was not legal tender. The power to make currency legal tender is an attribute of sovereignty, and Japan had not acquired sovereignty over the Philippines by occupying that area. Moreover, to be legal tender a note must have either a certification by the Government that the amount of the note is on deposit and is payable to the bearer on demand or an absolute promise to pay the amount stated to the bearer on demand. The undertaking of the Japanese authorities to " have the correct amount to back them up " was an empty promise, since that Government did not in fact have the pesos to pay these notes.

The Philippine Government-in-exile adhered to the London Declaration of January 5, 1943. By so doing, it declared invalid any dealings by the Occupying Powers with property rights and interests, regardless of their legal form. The Court is bound by the action of the political departments of the Government.

NOTE.—This decision was vigorously criticized by Hyde, " Concerning the Haw Pia Case ", in *Philippine Law Journal*, 24 (1949), p. 141. Professor Hyde's discussion concluded as follows :

> " What follows is . . . merely a brief statement of the several difficulties and improprieties in the Haw Pia case that have been noted above. They vary in importance and significance ; but they dovetail together in such a way as to reveal and accentuate the wrongful conduct of both the occupant and the Court, as well as the resulting responsibility that has been thrust upon the Republic.
>
> " It is not shown that the debtor sought to pay her debt to the liquidator in denominations of Japanese pesos that had been made legal tender by the occupant. The liquidator did not fulfill its normal functions as such because it did not pay, except in small part, debts of foreign banks due to depositors. The liquidator, for reasons of its own, declined to release the mortgage to the mortgagee. In consequence of the inflation that ensued, a payment of the debt in Japanese pesos, at the time of the

attempted payment in August, 1944, spelled a satisfaction in worthless currency that to all intent and purposes robbed the creditor of its property, and was thus sharply contrary to what previous practices had ordained and was without precedent. It violated also the spirit of the Hague Regulations of 1907, which notably in Article 43 stood for the very antithesis of such action, obliging the occupant to take all measures in its power to restore and ensure, as far as possible, public law and safety. Finally, through acceptance of the Inter-Allied Declaration of January 5, 1943, as officially interpreted, the Republic made definite commitments obliging it to undo by some appropriate process the harm done by the Japanese enactments. The Republic failed to satisfy this obligation, and found itself contractually delinquent when its tribunal proceeded to release the mortgage." Id. (At pp. 162–163.)

The Court replied to Professor Hyde's criticism in its opinion in the case of *Gibbs et Al.* v. *Rodríguez et Al.* (Case No. 204 in this volume).

The validity of Japanese occupation currency as legal tender during the period of the occupation was repeatedly upheld by the Supreme Court of the Philippines. *Salvador Araneta* v. *Alva J. Hill*, 49 Off. Gaz. 5398 (1953); *Maxima Valdeabella et Al.* v. *Luz Márquez et Al.*, 48 Off. Gaz. 719 (1952); *Fidelity and Surety Co. of the Philippines* v. *Sixto A. Carlos*, 47 Off. Gaz. 4084 (1951); *Plácida Clemente de Belarmino and Mauro Belarmino* v. *Pedro de Mesa*, 47 Off. Gaz. 3460 (1951); *La Orden de Padres Benedictinos de Filipinas* v. *Philippine Trust Co.*, 47 Off. Gaz. 2894 (1951); *Alejandro Andres and Herminia Pichay* v. *Rosario Mata et Al.*, 47 Off. Gaz. 2876 (1951); *Engracio de Asis* v. *José B. Feliciano*, 47 Off. Gaz. 2313 (1951); *F. V. Larraga and Florentina Enterezo* v. *Eulogía B. Báñez*, 47 Off. Gaz. 696 (1951); *Isidro Lamadrid* v. *Encarnación Verzo*, 47 Off. Gaz. 5170 (1951); *Francisco Quintela* v. *Manuel Cacho and Rafaela G. Ybarlin*, 47 Off. Gaz. 4220 (1951); *Antonio Del Rosario et Al.* v. *Carlos Sándico et Al.*, 47 Off. Gaz. 2866 (1951). However, a bank deposit made during the Japanese occupation with Japanese occupation currency was held invalid after the liberation of the Philippines: *Villanueva and Sanidad* v. *Director of Posts*, 47 Off. Gaz. 693 (1951).

Belligerent Occupation—Legislative and Administrative Functions of Occupant—Sequestration of Assets of Bank by Occupant—Power of Occupant to Issue Currency—Payment of Debts in Occupation Currency—Judicial Decisions of Municipal Courts as Evidence of International Law. **Case No. 204**

GIBBS *ET AL.* *v.* RODRÍGUEZ *ET AL.*

Philippines, Supreme Court.

August 3, 1949, and *December* 21, 1950.

THE FACTS.—The plaintiffs in this action had in April 1941 sold to one Navarro and R. F. Navarro & Co. two parcels of

Case No. 204 *Contd.* land and had taken a mortgage on the premises to secure payment of the balance of the purchase price. The mortgage called for payments in yearly instalments. In August 1941, the premises were sold to the defendant Luzon Surety Company, Inc., which, with the consent of the mortgagees, took over the mortgage. During the Japanese occupation of the Philippines, the Department of Enemy Property established by the Japanese Military Administration in the City of Manila required the defendants to pay to the Department the debt due by them to the plaintiffs, who were considered enemy nationals. The amount then owing to the plaintiffs was accordingly paid by the Luzon Surety Company to the Department of Enemy Property. The Department thereupon issued a receipt and a deed of cancellation of the mortgage.

This was an action to recover that portion of the purchase price and the interest thereon which had not been paid to the plaintiffs prior to the Japanese occupation. The Court of First Instance of Manila gave judgment for the plaintiffs.

On appeal,

Held (on August 3, 1949): that the decision appealed from must be reversed. The collection of the mortgage debt by the Japanese Military Administration did not constitute a confiscation of the plaintiffs' property. The payment made by the defendant Luzon Surety Company was valid and released the defendants' obligation to the plaintiffs. The Court said:

" This Court reversed the decision of the lower court in the case of *Hongkong and Shanghai Banking Corporation* v. *Luís Pérez Samanillo, Inc., et Al.*, on the strength of the ruling of this Court in the case of *Haw Pia* v. *China Banking Corporation*, L–554, 45 Off. Gaz. (Supp. to No. 9), 229,[1] in which the facts and law involved were similar to those in *Haw Pia*. In this last case we held that the collection by the Bank of Taiwan of the China Banking Corporation's credit from the latter's debtor by order of the Japanese Military Administration was not a confiscation but a sequestration of enemy private personal property, and therefore the payment by the plaintiff Haw Pia to the Bank of Taiwan was valid and released plaintiff's obligation to the defendant bank. Therefore, we have to reverse also the decision of the lower court in the present case.

" The plaintiff's contention that the debt of the defendants in the present case was payable in dollars or its equivalent in Philippine pesos at the option of the plaintiffs is immaterial, because both the Philippine pesos and American dollars at the rate of one dollar for two pesos were then legal tender in the Philippines according to section 1612 of the Revised Administrative Code, and for that reason the lower court sentenced the defendants to pay the plaintiffs in dollars or its equivalent in

[1] See Case No. 203 in this volume.

Philippine pesos. Besides we have held in the case of *Haw Pia* the following :

" ' But be that as it may, whatever might have been the intrinsic or extrinsic worth of the Japanese war-notes which the Bank of Taiwan has received as full satisfaction of the obligations of the appellee's debtors to it, is of no consequence in the present case. As we have already stated, the Japanese war-notes were issued as legal tender at par with the Philippine peso, and guaranteed by the Japanese Government " which takes full responsibility for their usage having the correct amount to back them up " (Proclamation of January 3, 1942). Now that the outcome of the war has turned against Japan, the enemy banks have the right to demand from Japan, through their States or Government, payments or compensation in Philippine pesos or U.S. dollars as the case may be, for the loss or damage inflicted on the property by the emergency war measure taken by the enemy. If Japan had won the war or were the victor, the property or money of said banks sequestrated or impounded by her might be retained by Japan and credited to the respective State of which the owners of said banks were nationals, as a payment on account of the sums payable by them as indemnity under the treaties, and the said owners were to look for compensation in Philippine pesos or U.S. dollars to their respective States. (Treaty of Versailles and other peace treaties entered [into] at the close of the first World War; VI Hackworth Digest of International Law, p. 232.) And if they cannot get any or sufficient compensation either from the enemy or from their States, because of their insolvency or impossibility to pay, they have naturally to suffer, as everybody else, the losses incident to all wars.' "

One Judge dissented, and one concurred in part.

[Report : 47 Off. Gaz. 186 (1951).]

On motion for reconsideration.

Held (on December 21, 1950) : that the motion for reconsideration must be denied. The Japanese Military Administration had the right to sequestrate the plaintiffs' credit and to demand the payment of all the defendants' debts to the plaintiffs in Japanese military notes. The decision of the Court in the *Haw Pia* case rested upon this ground rather than upon the validity of the Japanese decrees permitting a local debtor to satisfy his pre-war indebtedness by payment in a greatly depreciated military currency. The Japanese Government remains responsible for the payment of the foreign bank credits it sequestered. The Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, of January 5, 1943, did not require that payments to the Japanese Military Administration be declared invalid. The Court said :

" As to the first ground, suffice it to say that if the Japanese military occupant had power to sequestrate and, in fact, sequestrated the plaintiffs' credit, it had subrogated into the rights or stood in the shoes of the plaintiffs as creditor and, therefore, had the right to demand and accept, through Japanese Enemy Property Custodian, the payment of all the defendants' debts to the plaintiffs in Japanese military notes without of course compelling the defendants to pay interests not yet then due, and completely release thereby said obligation, without prejudice to the plaintiffs' right to demand, through their government from the Japanese after the war, the reimbursement of the full value of their sequestrated credit. We have held in the decision that ' whatever might have been the intrinsic or extrinsic value of the Japanese war-notes which the Bank of Taiwan has received as full satisfaction of the obligation of the appellee's debtors to it, is of no consequence in the present case. As we have already stated, the Japanese war-notes were issued as legal tender at par with the Philippine peso, and guaranteed by Japanese Government which " takes full responsibility for their usage having the correct amount to back them up " (Proclamation of Jan. 3, 1942). Now that the outcome of the war has turned against Japan, the enemy banks have the right to demand from Japan, through their States or Government, payments or compensation in Philippine pesos or U.S. dollars as the case may be, for the loss or damage inflicted on the property by the emergency war measure taken by the enemy.'

" Furthermore, when the Court of First Instance of Manila rendered judgment sentencing the defendants in the present case to pay their debt to the plaintiffs, after the moratorium has been lifted, in American dollars or *its equivalent in Philippine pesos* which, according to said section 1612 of the Revised Administrative Code, was at the rate of two Philippine pesos to one American dollar, the plaintiffs did not appeal from said part of the judgment nor assail it as erroneous in their briefs, and therefore plaintiffs can not now raise that question for the first time in their motion for reconsideration.

" The decision of this Court in the *Legarda* case did not hold that the defendant Burke had the right to refuse the payment by the debtor of his debt in British currency in Japanese war notes. This Supreme Court returned the case to the lower court for further proceeding and the writer of the opinion of the court in said case only said that ' still it is *serious question* whether the defendant Burke who was a special creditor having the right to insist upon his option to receive payment in British currency or the equivalent of British currency at that time, could be enjoined to receive Japanese money specially at par '. Moreover in the *Legarda* case the action was instituted by the debtor against his creditor to compel the latter to accept the payment in Japanese military notes, while in the present the payment of the debtors' debt to their creditors was demanded and accepted by the Japanese Military Occupant in the exercise of its power to sequestrate the property of said creditors who were enemy citizens, without prejudice to the right of the latter to demand from the Japanese Government full compensation for the seizure through State Department channels at the peace table. (*United States* v. *S. S. White Dental Manufacturing Co.*, 274 U.S., 398, 402 [1927].)[1]

" With respect to the article of Professor Charles Cheney Hyde on the decision of this Court in the case of *Haw Pia* v. *China Banking Corporation* (45 Off. Gaz. [Supp. to No. 9], p. 229) it may not be amiss to state, by way of a preamble before proceeding, that according to Article 38 of the Statute of the International Court of Justice, the Court shall, subject to certain limitations, apply judicial decisions as a subsidiary means for the determination of rules of international law. Although courts are not organs of the State for expressing in a binding manner its views on foreign affairs, they are nevertheless organs of the State giving, as a rule, impartial expression to what is believed to be International Law. For this reason, judgments of municipal tribunals are of considerable practical importance for determining what is the right rule of International Law. This is now being increasingly recognized, and periodical unofficial collections of decisions of both international and municipal courts are being published. In pleadings before international tribunals litigants still fortify their arguments by reference to writings of international jurists, but with the growth of international judicial activity and of the practice of States evidenced by widely accessible records and reports, it is natural that reliance on the authority of writers as evidence of International Law should tend to diminish. For it is as evidence of the law and not as a law-creating factor that the usefulness of teachings of writers has been occasionally admitted in judicial pronouncements. But inasmuch as a source of law is conceived as a factor influencing the judge in rendering his decision, the work of writers may continue to play a part *in proportion to its intrinsic scientific value, its impartiality* and its determination to scrutinize critically the practice of States by reference to legal principle. (International Law by Oppenheim, Vol. I, pp. 29–32.)

" It does not seem, therefore, proper for an attorney or jurist, in trying to protect or defend the interest of parties affected adversely by a decision rendered by the Supreme Court of a Sovereign Foreign Power, to assail it with arguments premised on facts different from those found by their court on which the decision is based and dub that decision as one in violation of International Law. A decision of the Supreme Court of the small Republic of the Philippines is as much a source of International Law as a decision of the Supreme Court of the great Republic of the United States of America.

---

[1] See *Annual Digest*, 1927–1928, Case No. 367.

Case No. 204 *Contd.*

The article of Professor Hyde in which the author, commenting on the decision in the *Haw Pia* case, says that it 'will do the *utmost harm to American Interest*',[1] does not deserve the same weight as his opinions set forth in his work 'International Law chiefly as interpreted and applied by the United States'. Because the article was written and published more than one year after our decision, not by an impartial jurist and *ante litem motam*, but by an attorney who tries to defend American interests in the Philippines after an action was instituted in the Supreme Court of the State of New York by the Compañía Tabacalera, a corporation owned mostly by Spaniards and doing business in these islands, against the National City Bank of New York, an action based on the decision of this Supreme Court of the Philippines in the said *Haw Pia* case.

"For clarity's sake, we shall discuss separately the arguments and conclusions advanced by Mr. Hyde in support of his contention that our decision in the *Haw Pia* case is a violation of International Law; (1) first, on the validity of the payment made in war notes to the Bank of Taiwan by Haw Pia of his pre-war debt to the China Bank; (2) secondly, on the alleged failure of the Bank of Taiwan, liquidator of the China Banking Corporation, to properly and adequately perform its function as such; (3) and thirdly, on the so-called failure of the Philippine Republic to heed certain contractual undertaking in the Inter-Allied Declaration of January 5, 1943, in London, to which the late President Quezon adhered in behalf of the Commonwealth of the Philippines. We shall copy the pertinent parts of the article dealing with each of those subjects, and then refute Mr. Hyde's contentions by transcribing the corresponding portion of our decision in said *Haw Pia* case plus some additional comments.

"(1) As to the first, Professor Hyde has evidently missed the point with respect to the main issue decided in the *Haw Pia* case in the article in question, and consequently his conclusions are incorrect from the beginning to the end for they are based on wrong premises. At the beginning he says, among others, the following:

'The decision of the Supreme Court of the Philippine Republic in the *Haw Pia* case constitutes internationally illegal conduct upon the part of the Philippine Government which is productive of a solid claim for compensation in behalf of alien nationals or creditors who suffered loss as a direct consequence of such decision. The Japanese decrees which permitted Haw Pia, a local debtor, fully to satisfy her pre-war peso indebtedness to the local office of a foreign creditor bank by payment in a greatly depreciated Japanese military currency were in violation of International Law. They permitted the debtor to satisfy her debt in a currency not contemplated by the parties and of little or no value at the time of payment. By such payment a mortgage of property given to secure such debt was satisfied of record. The recognition by the Supreme Court of the Philippines of the Japanese decrees which resulted in this harm-producing act is also a violation of International Law by such court.

---

[1] Justice is a blind Goddess who administers the law regardless of the parties' station in life, color or race. The writer of the decision in the *Haw Pia* case was, before his appointment to the Supreme Court, a retained attorney for about twenty years of the China Banking Corporation against which the decision was rendered in favor of Haw Pia, a Chinaman.

'This decision will do the utmost harm to American interests in the Philippines unless remedied by Philippine legislation or some kindred process.

'In the *Haw Pia* case there has been confusion of thought manifested in various quarters due in part to failure to observe all the relevant facts in the case, to failure also to observe the character of the practice that has grown up in relation to the privileges of a belligerent occupant especially in relation to uses of legal tender, and to failure to observe the nature of certain acts on the part of the Japanese agency or so-called liquidator in the present case, and finally, to observe the failure of the Philippine Republic to heed certain contractual undertakings which it has accepted. . . .

'In a word, various aspects of the case have been dealt with by the courts and commentators in a fantastic way that might be called old-fashioned, because of failure to seek light on what state practices ordained, and because ignorance thereof served to bolster up conclusions that could not have been reached if faithful and penetrating studies of that practice had been made. Again, loose treatment of some secondary materials has pointed to neglectful and superficial work. Thus, for example, the views of this writer have more than once been quoted or cited as indicating the rights of a belligerent occupant as such when those views had reference to a different matter, and notably to what a belligerent State might do with respect to alien enemy property found within its own domain. Much more important, " no question has been raised as to the value of the money paid ".

. . . . . .

'We now come to the question whether a belligerent occupant has the right through such uses of a depressed currency, by making it legal tender and continuing it as such, to oblige a creditor to accept in payment of a debt something that was at the time of payment practically or almost worthless. As has been suggested above, there is no evidence manifested by any practices that have been seen which indicates that occupying powers (other than Japan) have sought by causing a depressed currency to be legal tender, to oblige a creditor to accept in payment of a debt something that was of little value. The scope of the occupant's right depends *upon the degree of harm* wrought to the creditor by the occupant's decrees.

'In a word, the practice which has developed shows a significant and complete abstention from such conduct on the part of occupants and also vigorous and successful restrictions from foreign offended States when it was attempted. In general the abstention and the correction of abuses may be regarded as establishing a general rule of International Law forbidding the occupant to make it possible for the debtor to rob his creditors by the satisfaction of a debt

Case No. 204 *Contd.* through a greatly depreciated and practically worthless currency. Indeed what has taken place amounts to an impressive practice reflecting the creation or acknowledgment of a prohibitive rule of International Law. The general tenor of the Hague Regulations of 1907 is in complete harmony with this limitation of the right of the occupant as thus set forth. Or, to express it differently, those Regulations call for the limitation. . . . (Philippine Law Journal, Vol. XXIV, June, 1949, pp. 141, 142, 144–145.)'

" Professor Hyde has missed the point, because the question involved and decided in the *Haw Pia* case was not the validity of the Japanese decrees permitting a local debtor to satisfy fully his pre-war indebtedness to the local office of a foreign creditor bank by payment in a greatly depreciated military currency, but the power of the Japanese Military Administration to order valid the liquidation or winding up of the defendant China Banking Corporation, considered as a hostile bank, by the Bank of Taiwan, appointed as the liquidator and authorized to demand and accept the payment by the debtors of the defendant bank in order to sequestrate the latter's assets. And the ruling in the *Haw Pia* case has been applied to the present case, as well as to the cases of *Hongkong & Shanghai Banking Corporation* v. *Pérez Samanillo* (G. R. No. L–1345) and *Everret Steamship Corporation* v. *Bank of the Philippine Islands* (G. R. No. L–1729), because in these three cases the Japanese Military Administration required the debtors to pay to the Bank of Taiwan, as depository of the Bureau of Enemy Property Custody or Alien Property Custodian, their debts to their creditors who were alien enemies, in order to sequestrate, not confiscate, the properties of the enemy aliens during the war, sequestration permitted and not prohibited by International Law or the Hague Regulations.

" In our decision in the *Haw Pia* case we held, among others, the following :

[The Court here quoted from the *Haw Pia* case.]

" As we have already said, from the decision above quoted it appears that the ' question whether a belligerent occupant has the right through such uses of a depressed currency, by making it legal tender and continuing it as such to oblige a creditor to accept in payment of a debt something that was at the time of payment practically or almost worthless ', which Prof. Hyde discusses at length in his article, has no bearing on the question involved and decided in the *Haw Pia* case and, therefore, Prof. Hyde's criticisms are predicated upon a wrong premise.

" However, although the question of legal tender was only incidental to the issue in the *Haw Pia* case, we have shown in our decision that the power of a military occupant to issue military currency is based, not only on the military occupant's general power to maintain law and order recognized in Art. 43

of the Hague Regulations, but also on military necessity ; and said power was exercised during the last World War not only by Germany who used in most occupied areas the Reichskreditkasse mark, a paper currency printed in Germany and denominated in German monetary units, but also by the Allies in the occupied enemy territory of Sicily, Germany and Austria. The Combined Directives of the Combined Chiefs of Staff of the Supreme Allied Commander issued on June 24, 1943, April 28, 1944, and June 27, 1947, declared respectively as legal tender the yellow seal dollars currency and the British military notes (BMN) in Sicily, the Allied military mark and the yellow seal dollars in Germany, and the Allied military schillings in Austria. When the Japanese military occupant issued the proclamation of January 3, 1942, which declared the Japanese military notes of small denominations up to ten pesos as legal tender at par with the Philippine peso, the purchasing power of said notes was then the same as that of the Philippine peso. If the Japanese war notes became depressed and valueless, it was because the war was prolonged and lost by the Japanese contrary to their expectation of winning the war in a short time, and not because they issued purposely a depressed and valueless currency as legal tender. If their expectation had been realized no question as to the validity of the Japanese military notes as legal tender would have come up.

" There was no Japanese order or decree or any particular case in which the Japanese military occupant or agents had actually compelled all creditors to accept in payment of pre-war debts depressed currency or Japanese war notes ; as a matter of fact several cases are still pending in our courts in which debtors of pre-war debts had to file civil actions to compel their creditors to accept Japanese war notes deposited by them in court in payment of pre-war obligations which became due and payable during the occupation. What the Japanese military occupant did in the *Haw Pia* case was to issue administrative Ordinance No. 1, dated July 31, 1941, ordering the liquidation of the seven banks of hostile countries, among them the defendant China Banking Corporation, appointing the Bank of Taiwan, Ltd. as liquidator of said banks and demanding the payments of all loans, advances and other receivables of the banks which were thereby declared due and payable notwithstanding the terms and conditions of the contract, in order to sequestrate the latter's assets during the war ; and in the present case as well as the *Pérez Samanillo* and *Everret* cases the Japanese Military Administration ordered the debtors to pay to the Japanese Enemy Property Custodian or Bank of Taiwan their debts due to their creditors who were enemy aliens or corporations, in order to sequestrate the money so paid. Of course the medium of payment, being a currency declared legal tender by the same Japanese military occupant,

Case No. 204 *Contd.*

had to be accepted by the Bank of Taiwan, an agent of the latter, for it would have been the height of folly and an absurdity for the Bank of Taiwan to refuse to accept them ; for even if they were valueless the enemy creditors would not legally suffer any loss thereby, because under the International Law the Japanese military authorities were responsible after the war to pay said creditors full compensation for such sequestration through their respective governments at the conference table, regardless of the intrinsic or extrinsic value of the money accepted by them.

" As we have stated in this connection in our decision ' But be that as it may, whatever might have been the intrinsic or extrinsic value of the Japanese war-notes which the Bank of Taiwan has received as full satisfaction of the obligation of the appellee's debtors to it, is of no consequence in the present case. As we have already stated, the Japanese war-notes were issued as legal tender at par with the Philippine peso, and guaranteed by the Japanese Government " which takes full responsibility for their usage having the correct amount to back them up " (Proclamation of Jan. 3, 1942). Now that the outcome of the war has turned against Japan, the enemy banks have the right to demand from Japan, through their States or Government, payments or compensation in Philippine pesos or U.S. dollars as the case may be, for the loss or damage inflicted on the property by the emergency war measure taken by the enemy. If Japan had won the war or were the victor, the property or money of said banks sequestrated or impounded by her might be retained by Japan and credited to the respective State of which the owners of said banks were nationals, as a payment on account of the sums payable by them as indemnity under the treaties, and the said owners were to look for compensation to their respective States.' (VI Hackworth Digest of International Law, p. 232 ; 2 Oppenheim, 6th ed. by Lauterpacht, page 263.)

" We have quoted once the view of Professor Hyde on the assumption that Professor Hyde would not give the words ' domain or territory ', wherein private property of enemy nationals may be sequestrated under the Trading with the Enemy Act, an interpretation he seems to give now in his article, different from that of the other writers and authorities we have also quoted and specially of the Executive Department of the United States Government which we shall hereinafter quote, in order to show that if the United States as well as the other Allied countries applied and enforced during the last world war their Trading with the Enemy Act in any territory occupied by their armed forces, as we have shown in our decision, Japan had also the right to do the same in the Philippines by virtue of the international law principle that ' what is permitted to one belligerent is also allowed to the other '.

" An agency of the Executive Branch of the United States Government, *i.e.*, the Alien Property Custodian, in March, 1944, recognized the validity of the liquidation by the Japanese military authorities of branches of the National City Bank of New York situated in Japan, Korea and in territory occupied by the Japanese military forces, namely, Tokyo, Darien and Harbin. The Custodian expressly held that payments made by debtors of said branch banks to the Japanese liquidator, namely, the Yokohama Specie Bank, appointed under the Japanese Enemy Assets Control Law (December 22, 1941), constituted valid payment of such debts to the branch banks. The authority for the appointment of the Yokohama Specie Bank, Limited, as such liquidator was identical with that for the appointment of the Bank of Taiwan as liquidator of China Bank Corporation plaintiff in the *Haw Pia* case.

" This determination was made in the proceedings for the liquidation of the New York branch of the Yokohama Specie Bank conducted by the Superintendent of Bank of the State of New York under the supervision of the United States Alien Property Custodian, and was based upon an opinion of the General Counsel to the Alien Property Custodian, dated March 14, 1944, in which the said General Counsel held in part as follows :

' There is in fact reason to believe that National City Bank has no cause of action against anyone. Article III of the Enemy Assets Control Law of Japan (December 22, 1941) provides :

' " When a person liable for a debt to an enemy country, an enemy national, or others designated by the Order, performs to a person designated by the Government, the payment of money or the delivery of articles which are the object of the debt—it shall have discharged that obligation."

' By order of February 10, 1942, made pursuant to the Enemy Assets Control Law (December 22, 1941), Yokohama Specie Bank was entrusted by the Japanese government with the liquidation of National City Bank's branches in Japan and occupied territory, subject to no presently relevant exceptions. Upon appointment, Yokohama Specie Bank commenced the liquidation thereof. Information obtained from an officer of the Department of State, recently repatriated from Japan, indicates that liquidation of National City Bank, Japan, has proceeded in accordance with the law quoted above. It is fair assumption that Yokohama Specie Bank, engaged in liquidating these branches in its capacity as administrator, collected from itself in its capacity as a commercial bank the moneys owing to National City Bank's foreign branches, and consequently that the Yokohama Specie Bank branches were, in accordance with the terms of Article III, *supra*, discharged of those obligations. The deposits of National City Bank branches in the Far Eastern branches of Yokohama Specie Bank are outside the jurisdiction of the United States, and the only liability that Yokohama Specie Bank incurred by its failure to pay was that which the Japanese law might impose.

Case No. 204 *Contd.* *Deutsche Bank Filiale Nürnberg* v. *Humphrey*, 272 U.S., 517, 520 (1926). By that law, payment of the deposits to the governmental administrator satisfied the debt owed by the depository. If the obligation was discharged by Japanese law, no right remains to be recognized in this country, except such as may be urged through State Department channels at the peace table. See *United States* v. *S. S. White Dental Mfg. Co.*, 274 U.S. (1927).[1] As was said by Mr. Justice Holmes in an analogous case :

' ". . . in any view of all that had happened the only obligations of the Wiener Bank-Verein were those imposed by the law of Austria-Hungary, and that if that law discharged the debt, the debt was discharged everywhere." *Zimmerman* v. *Sutherland*, 274 U.S., 253, 256 (1927).

' The opinion proceeds to state that the sequestration in question was effected pursuant to valid and binding orders of the Japanese government and that recognition is given by the courts of the United States to the power of a belligerent to thus sequester property even when that power is exercised adversely to United States nationals. *United States* v. *White Dental Mfg. Co.*, 274 U.S. 398. The sequestration was held not to create any right in the National City Bank and to have imposed no liability on the Japanese Government except as may arise from subsequent treaties. As was said by Mr. Justice Stone :

' " The sequestration of enemy property was within the rights of the German government as a belligerent power and when effected left the corporation without right to demand its release on compensation for its seizure, at least until the declaration of peace. . . ." *United States* v. *S. S. White Dental Mfg. Co.*, 274 U.S. 398, 402 (1927).'

" (2) Prof. Hyde discussing the second point says :

' In the present case the Bank of Taiwan is constantly referred to as the " Liquidator " of the China Banking Corporation. This leads to the question whether it properly or adequately performed its function as liquidator. The liquidation of a corporation is synonymous with the winding up of the affairs of the corporation. There is no proper or complete liquidation in which debts to creditors are not settled and paid as well as assets reduced to a liquid state. In the present case, only about ten per cent of the deposits of foreign banks were allowed to be withdrawn.

' The conduct of the liquidator in the present case had also another significance. Its retention of money representing debts due by foreign banks to depositors served in fact to be a convenient means of preserving them so that they would be subjected to the dangers of inflation and deterioration of currency which the Japanese Government might later apply. Thus here was a process whereby the occupant held within its grip something which later by a method akin to confiscation it could ruin the value of, contrary to the injunctions of the Hague Regulations. Looked at in this way, the conduct of the liquidator as an agency of the Japanese Government together with the later action of that Government united jointly to facilitate and also effectuate the commission of an international wrong. That wrong was of a type which Article 43 and 46 of the Hague Regulations of 1907 appeared to forbid.

---

[1] See *Annual Digest*, 1927–1928, Case No. 367.

'A third conclusion is to be drawn from the same fact. There would be a discrimination against non-Filipinos not permissible pursuant to international law. Filipinos, axis nationals and neutrals were able to utilize the payments received by them at a time when they had value. The foreign banks on the other hand could not pay more than ten per cent of their deposits and remained indebted to their depositors in full.

. . . . . .

'The refusal of the liquidator, the Bank of Taiwan, twice to release the mortgage in the *Haw Pia* case stands out as a significant fact. Of course, it is possible that the liquidator received payment of 4,563.78 pesos made by the debtor in August 1944 merely for what it was worth. It may have been known to the liquidator at the time that Japanese military pesos of larger denominations than ten peso notes had not been made legal tender, or it may have doubted whether they had been tender. Hence the liquidator may have felt obliged, in case payment were made in such larger Japanese notes, not to regard them as adequate for the settlement of the debt. Or, the liquidator may have been influenced by the vastness and impropriety of the Japanese acts of inflation which if allowed to enable the debtor to pay her debt therewith, would have amounted to sheer robbery of the creditor, both violative of precedent and hurtful to the prestige of the Japanese Government. In a word, there are numerous reasons any one of which might have served to put the liquidator on its guard, and to cause it to leave the matter to its own later decision. Be that as it may, it is a reasonable assumption that shrewd debtors ran to the windows of the Bank of Taiwan in the attempt to take advantage of the decrease of the value of the occupation currency, one peso of the Philippines being then equivalent to at least fifteen pesos of the military notes.'

"The liquidation ordered by the Japanese Administrative Ordinance No. 11 of July 31, 1940, was not a complete liquidation of all the affairs of the local Banks controlled by enemy nationals, but only a liquidation of all the credits of said banks in order to liquidate and sequestrate them. Said Ordinance only provided that '2. The Bank of Taiwan Ltd. has been appointed liquidator of the above bank. 3. All loans, advances and other receivables of the banks are hereby declared due and payable notwithstanding the terms and conditions of the contract. *Debtors are given from today until September 30, 1942*, to pay the principal and interest of their obligations. All payments made thereafter shall be charged additional interest at 3 per cent per annum, except only in special case where they may be waived.' For that reason the creditors or depositors of the Banks were allowed to withdraw restricted amounts only from their deposits as a protective measure to prevent runs on banks owned or controlled by the enemy nationals, which

Case No. 204 *Contd.*

would result from mass withdrawals. And it is incorrect or contrary to facts to say, as Professor Hyde avers, that ' only about ten per cent of the deposits of foreign banks were allowed to be withdrawn '. For what we have found in our decision in the *Haw Pia* case is the following :

> ' That the liquidation or winding up of the business of the China Banking Corporation and other enemy banks did not constitute a confiscation or appropriation of their properties or of the debts due them from their debtors, but a mere sequestration of their assets during the duration of the war for the purposes already stated, is evidenced conclusively by the following uncontroverted facts set forth in the briefs of both parties and *amici curiae* :
>
> ' (1) Out of the sum of about ₱34,000,000.00 collected from the debtors by the liquidator Bank of Taiwan, the latter paid out to the depositors or creditors of the same Bank about ₱9,000,000.00 ; and it is common sense that this last amount should not have been [disbursed] or taken out of the said amount of about ₱34,000,000.00 had it been the intention of the Japanese Military Administration to confiscate this amount collected by the Bank of Taiwan. . . .'

" As the enemy banks were closed and had not received deposits in Japanese Military notes during the occupation, they did not run the risk, as the other banks did, of being responsible for such deposits in genuine Philippine currency had not the Philippine Government declared after liberation such deposits to be of no value. The retention by the liquidator ' of money representing debts due by foreign banks to depositors ' did not, as Professor Hyde affirms, ' serve in fact to be a convenient means of preserving them so that they would be subjected to the dangers of inflation and deterioration of currency which the Japanese Government might later apply '. As all the payments made to the Bank of Taiwan in Japanese war-notes of the credits of the enemy Banks, except about twenty-seven, not ten, per cent paid by the liquidator to the Banks' depositors, had been sequestrated, said banks could not have been subjected to the dangers of inflation or deterioration of currency ; because, we have already stated above, the Japanese Government assumed the responsibility and is responsible for the payment, in terms of Philippine pesos or U.S. dollars, of the foreign Banks' credits they have collected and sequestrated, and the Banks may demand the payment thereof through their respective Governments at the Peace Conference.

" Although it is obviously immaterial whatever may have been the opinion of the legislator on the validity or adequacy of the currency paid by Haw Pia for the settlement of his debt, there is nothing in the record to show that the Bank of Taiwan refused or declined twice to release the mortgage in the *Haw Pia* case, as Professor Hyde affirms. What appeared in the record was that Haw Pia alleged in his complaint filed in August, 1945, that the defendants, referring to the China Banking Corporation because the Bank of Taiwan was only a nominal defendant and in 1945 was no longer doing business in the Philippines, refused and neglected to execute the deed of cancellation of mortgage of the property, and for that reason Haw Pia had filed that action against the China Banking Corporation. It is a fact, of which we have judicial notice, that the Bank of Taiwan had executed deeds of cancellation of mortgages for all payments received by it in payment of the Banks' and the enemy nationals' mortgage credits, and the plaintiffs in the present case of *Gibbs* v. *Rodríguez* and in the case of *Hongkong Shanghai Banking Corporation* v. *Pérez Samanillo*, precisely demanded in their action the annulment of the deed of cancellation of the defendants' mortgages executed by the Bank of Taiwan.

" (3) And, with respect to the so-called failure of the Philippine Republic to heed a certain contractual undertaking in the Inter-Allied Declaration of January 5, 1943, Professor Hyde says in his article the following :

> ' We now come to an important contractual undertaking by the Philippine Republic. The Government of the Philippines undertook to invalidate all Japanese dealings by which property in which nationals of United Nations were interested was hurt by violations of rules of International Law. Evidence of this undertaking is seen in the " Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control (with covering Statement by His Majesty's Government in the United Kingdom and Explanatory Memorandum issued by the Parties to the Declaration) ", London, January 5, 1943, to which the Government of the Commonwealth of the Philippines adhered on January 19, 1943.
>
> . . . . . .
>
> ' It is not here contended that the Allied Nations contemplated on January 5, 1943, the consideration of payments made to banks in the currency of the occupied European countries as invalid. The inflation in these countries had not progressed to a degree that such thoughts came to the minds of the signatories. It is here contended, however, that property is " dispossessed " within the meaning of the Inter-Allied Declaration where the degree of inflation is as great as that indicated in the figure in the table above given on page 135 of this document.
>
> ' If this be a correct statement, the Governments participating in the agreement of January 5, 1943, found themselves legally obliged to reach a determination that debtors were not relieved from liability by payments of debts to occupation authorities, when through a larger inflation such payment would amount to practical robbery of the creditor for the benefit of the debtor. . . .
>
> ' The Inter-Allied Declaration of January 5, 1943, in the light of the official interpretation given to it, has a direct bearing upon the obligation assumed by the Philippine Republic in the *Haw Pia* case. It is evidence of a definite undertaking by the Republic to undo the consequences of acts mutually regarded as wrongful, and manifested in the inflationary conduct of Japan that was contemptuous of the

Case No. 204 *Contd.* rights of alien creditors growing out of debts due them by Philippine debtors. [A] direct consequence of the agreement was the obligation on the part of the Republic by some appropriate process to permit no local agency, judicial or other, to give effect to the Japanese decrees. . . . Thus, when the Supreme Court, through ignorance of what had taken place, or for any other reason, regarded as enforceable or valid the Japanese edicts, it made itself the means by which its own country violated an international obligation laid down by contract. . . .'

" As we have already said, we have not determined in the *Haw Pia* case, contrary to Professor Hyde's erroneous assumption, that debtors were relieved from liability by payments in a greatly depreciated currency of Japanese war-notes to the occupation authorities of the pre-war debts they owed to their creditors (national, neutral or enemy aliens).

" What we have declared is that the military occupant had power to [order] the liquidation of the hostile banks, appoint the Bank of Taiwan as liquidator and sequestrate their assets, and that, therefore, the payment made by Haw Pia to the Bank of Taiwan of his pre-war debt to the China Banking Corporation was valid and extinguished his obligation to the latter ; and for that reason this Court did not deem it necessary to discuss and pass upon the effect on said case of the adherence by the late President Quezon in behalf of the Commonwealth of the Philippines to the United Nations Declaration of January 5, 1943, in London. Because in said declaration the United Nations ' stated their intention to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and people who have been so wantonly assaulted and despoiled ', and ' reserved all their rights to declare invalid, but did not actually invalidate, any transfers of, or dealing with, property, rights and interests of any description whatsoever ' in the occupied territories which have taken ' the form of open looting or plunder ' ; and we have held that the acts of the Japanese Occupant involved in the *Haw Pia* case did not constitute a confiscation but a mere sequestration of private property, not in excess of those limited rights granted such occupant under International Law.

" Besides, as the Governments which were parties to that agreement *did* not bind themselves, but only *reserved all* their rights, to invalidate such acts, the Government of the Philippines did not exercise that reserved right [1] to declare invalid the payments made to the Bank of Taiwan by debtors of their debts to the enemy banks or nationals. On the contrary it enacted in 1945 Commonwealth Act No. 727 which provided that ' payment on demand or tendered and accepted during the period of the Japanese invasion on obligation incurred or contracted prior to such period shall be considered valid '. Although said Act was vetoed by President Truman on the assumption that it was a currency statute and required his approval, it is obvious, without necessity of discussing whether or not said Act 727 was really a currency measure, that it was a declaration of the policy of the Legislative and Executive Departments of the Government."

---

[1] The *Evening News*, a daily newspaper, in its issue of May 25, 1948, published a news item by Mr. Jose F. Zaide a member of *Evening News* Staff and not denied by the proper authorities, which reads as follows : " British Minister Harry Linton Foulds in a diplomatic note to the foreign office early this month brought to the attention of the Philippine Government an ordinance approved by the Hongkong Government invalidating settlement of pre-war debts made during the occupation ", which, Minister Foulds said, " is also applicable to interests of Philippine nationals and firms in Hongkong as

One Judge dissented.

[Report : 48 Off. Gaz. 2198 (1952).]

Belligerent Occupation—Rights and Duties of Occupant—Article 43 of Hague Regulations.

See Case No. 173 (*Cobb* v. *United States*).

Belligerent Occupation—Legislative Powers of Occupant—Confiscation of Private Property by Belligerent Occupant—Recognition of—Articles 43 and 46 of Hague Regulations.

See Case No. 174 (*State of the Netherlands* v. *Federal Reserve Bank*).

Belligerent Occupation—Legislative and Administrative Functions of Occupant—Use of Services of Civilian Inhabitants to Suppress Resistance.

See Case No. 221 (*The People of the Philippines* v. *Higino Sigue*).

Belligerent Occupation—Administrative Powers of Occupant—Enforcement of Police Measures—Limits of Scope.

See Case No. 220 (*In re Hofmann*).

Belligerent Occupation—Rights and Duties of Occupant—Respect for Local Law—Powers of National Police Force.

See Case No. 220 (*In re Hofmann*).

a matter of reciprocity ", but in view of our decision in the *Haw Pia* case promulgated on April 9, 1948, " the British envoy sought Philippine opinion on the possibility of reconciling the divergent legal view. The British inquiry was believed motivated by the desire to protect extensive British banking interests in the Philippines, principally banking institutes. The foreign office in an answer transmitted to the British legation was reported to have stood pat on the ruling of this Supreme Court laid down in the *Haw Pia* case validating payment during the occupation."

iii.—Respect for Private Property. The Public Property of the Enemy State. Requisitions and Contributions

Case No. 205 **War—Enforcement of Laws of War—Hague Convention on Rules of Land Warfare—General Participation Clause—Belligerent Occupation—Respect for Private Property—Seizure of Means of Transport.**

ANCIENS ÉTABLISSEMENTS GRAF FRÈRES *v.* SOCIÉTÉ LA MURE.

France, Cour de Cassation, Chambre Civile. February 15, 1951.

THE FACTS.—On June 20, 1940, some soldiers belonging to the German forces of occupation in France seized, without notice of requisition, a lorry belonging to the respondent company. At the end of July 1940 the German authorities gave the lorry to the appellants for their use, and finally sold it to them in April 1941. The respondent company brought an action for recovery of the lorry, and on May 2, 1944, the Court of Appeal of Besançon declared the action to be well founded, and ordered the preparation of a report on the amount of damages suffered. This was an appeal against that decision. It was contended on behalf of the appellants that the decision of the Court of Appeal of Besançon was contrary to Article 53 of the Hague Convention of 1907, which permits claims for the recovery of means of transport seized by occupying authorities only after the cessation of hostilities.

Held: that the appeal must be rejected. The Hague Convention was inapplicable after the entry of Italy into the war, in view of the general participation clause contained therein. Moreover, the lorry in this case had not been lawfully seized, since there was no requisition. The Court said :

" Article 2 of the Hague Convention subjects its enforcement to the condition that all belligerents are parties to the Agreement. The entry into the war on June 10, 1940, of Italy, a State which has not ratified the 1907 Convention, made that Convention inapplicable even between France and Germany. In the absence of special provisions to the contrary, this is true irrespective of whether Italian nationals took part in the seizure or not.

" Moreover, the lower Court found that the seizure of the lorry was not accompanied by a requisition order, the only lawful method by which an occupying enemy may appropriate private property in time of war. The Court of Appeal was thus entitled to decide that ' the involuntary and even forced dispossession, resulting from an act of war ' relating to a lorry which remained private property and could not be war booty, 'constituted a loss in the meaning of Article 279 of the Civil Code' which could give rise to an action for recovery."

[Report: *Sirey*, 1951, I, p. 199.]

Belligerent Occupation—Requisitioning of Services—Compliance with Requisitions Contrary to Article 52 of Hague Regulations, 1907—Whether Defence to Charge of Assisting the Enemy. **Case No. 206**

In re DIRECTORS OF THE AMSTERDAMSE BALLAST MAATSCHAPPIJ.

Holland, Special Court of Cassation. June 16, 1951.

THE FACTS.—The Directors of the Amsterdamse Ballast Maatschappij, a large building and contracting business at Amsterdam, were prosecuted after the war for having provided materials and ordered the execution of certain works which went beyond what the Occupant was entitled under Article 52 of the Hague Regulations of 1907 to require. These works consisted of the extension and improvement of six airports in Holland, from which the German air force carried out attacks on Britain from June 1940 until January 1943. The defendants had thus rendered assistance to the enemy, contrary to Article 102 of the Netherlands Criminal Code. For the defence it was contended, *inter alia*, that the defendants had acted under *force majeure*; that they had never sought orders from the Germans; and that the occupying authorities were within their rights in ordering the carrying out of the works in question on the airfields. It was further contended that in any case the defendants had laboured under an excusable error of law, due to the fact that the Secretary-General of the Ministry concerned had on June 14, 1940, given them official advice on the scope and the limitations of the enemy's right of requisitioning under Article 52 of the Hague Regulations of 1907. After the defendants had twice been convicted by special courts and their convictions twice quashed on appeal,[1] they were convicted a third time,[2] and again appealed.

Held (by the Special Court of Cassation): that the convictions must stand. The advice of the Secretary-General of June 14, 1940, amounted to no more than this, that work executed under requisitioning by Netherlands contractors on airports used by the Occupant was not forbidden, because airports might serve the needs of the occupation army and could be compared with railway stations and marshalling

---

[1] Special Criminal Court at Amsterdam, April 1, 1946; Special Court of Cassation, July 15, 1946; Special Criminal Court at The Hague, July 13, 1948; Special Court of Cassation, February 14, 1949.

[2] Special Criminal Court at Arnhem, February 10, 1951.

Case No. 206 *Contd.* yards, but work on such things as air raid shelters and trenches was prohibited. The Court below had rightly challenged the correctness of this advice, because it disregarded the fact that the enemy needed and used Dutch airports in the summer of 1940 for continuing the war and in particular for his intended air attacks on Britain. Requisitioning of services for work on airports was, therefore, in these circumstances contrary to Article 52 of the Hague Regulations of 1907.

Nor had the accused acted under an excusable error by following the advice of the Secretary-General, which was patently incorrect. It was common knowledge that the lawful Government had left the country for England, and that the Secretaries-General who had been left in office were by no means " the highest remaining Netherlands governmental body " ; they were certainly not " the Government " (as the Court below had wrongly called them). They were simply Dutch officials retained in office by, and subordinated to, the German Reichskommissar. Moreover, it was also common knowledge that General Winkelman, Commander-in-Chief of the Netherlands Army (then exercising the supreme civil authority in Holland by virtue of a special mandate given him by the Netherlands Government on their departure), had issued orders and instructions concerning those activities of Netherlands industries, etc., which were permissible having regard to Article 52 of the Hague Regulations. These orders and instructions were contrary to the advice of the Secretary-General. After that time, at any rate, the accused were no longer justified in following the advice given by unauthorized Dutch officials, which was, moreover, directly contrary to express instructions of the Government issued before the war in contemplation of just such an emergency.[1] There was also evidence that the accused had built artillery towers, machine-gun posts, and the like, which certainly exceeded the limits set to them in the advice. On the other hand, there was no evidence whatsoever that the accused had really acted under duress.

[Report : *N.J.*, 1951, No. 621.]

Note.—In a similar case, which had much the same history of conviction and appeal, *In re Director of the Hollandse Beton-Maatschappij*, decided by the Special Court of Cassation on June 16,

---

[1] As early as May 1937, the Netherlands Government had issued, against the contingency of an outbreak of war, detailed confidential " Instructions with respect to the attitude to be taken by the administrative organs of the Kingdom, the provinces, municipalities and polders, their personnel and the personnel in the railway services, in case of an enemy invasion ". These Instructions were supplemented in May 1943 by a " Commentary " drafted in occupied Holland by one of the leaders of the resistance movement, which was smuggled to England and there officially adopted by the Netherlands Government-in-Exile as an authentic interpretation of the original Instructions. See, for the text of these Instructions and the Commentary, *Onderdrukking en Verzet* (an elaborate history of the German occupation of Holland under the title " Suppression and Resistance "), vol. I, pp. 385–397.

1951 (*N.J.*, 1951, No. 627), the final result was a complete acquittal of the accused because he was held genuinely to have acted under *force majeure.*

Belligerent Occupation—Respect for Private Property—Sequestration of Enemy Property by Occupant—Insurance of Property—Liability of Owner to Pay Insurance Premiums. **Case No. 207**

CHRISTEN *v.* ONDERLINGE OORLOGS-MOLESTVERZEKERINGS-MAATSCHAPPIJ.

Holland, Council for the Restoration of Legal Rights (Judicial Division), The Hague. May 5, 1951.

THE FACTS.—Christen was a Netherlands subject who owned a number of houses at The Hague. During the Second World War he was resident in Great Britain. In July 1942 the German occupation authorities treated his property in Holland as enemy property under Occupation Ordinance No. 26 of 1940, and placed it under compulsory administration. The " Verwalter " (administrator) took out a " molest "[1] insurance policy on the houses with the defendant insurance company. After the war Christen refused to pay the outstanding insurance premiums for the year 1944 and the first part of 1945, and now claimed[2] a declaration that the insurance policy was void.

Held: that the application must fail. It would not be reasonable to interfere in the legal position in this particular case. It was neither contrary to the law of nations, nor to the practice, followed by the Netherlands itself and its Allies during the war, of putting under compulsory administration the property of persons who happened to be in the country with which they were at war. The German Occupation Ordinance No. 26 of 1940 was therefore not unlawful, nor was it one of those declared in the Decree on Occupation Measures (No. E 93) of 1944 never to have been in force. On taking out the insurance policy with the defendant company the administrator was acting within his normal powers. There could therefore be no question of invalidating the policy, and the premium must be paid.

[Report: *Rechtsherstel*, 1951, No. 137.]

---

[1] *Anglice*: " free from consequences of hostilities or warlike operations " (Arnould, *Marine Insurance*, 13th ed. (1950), p. 905). For the history of the " molest " clause see *International Law Reports*, 1950, pp. 343–344.

[2] Under the special powers of the Judicial Division of the Council to review legal relations. These powers were exercised *ex aequo et bono*. The Council had the right to review and reopen legal relations which had come into existence in irregular circumstances during the German occupation, but which could not have been upset in the ordinary courts of law.

Case No. 208 **Belligerent Occupation—Respect for Private Property—Requisitions—Article 52 of the Hague Regulations, 1907—Non-Compliance with Formalities—Effect on Title to Property.**

PENSIOENFONDS VOOR DE GRAFISCHE VAKKEN *v.* P.C.G.

Holland, District Court of Amsterdam. December 6, 1950.
Court of Appeal of Amsterdam. November 28, 1951.

THE FACTS.—In or about September 1944, a calculating-machine was seized under a purported requisition in the Netherlands Fokker aircraft factories by German officials who failed to comply with any of the relevant provisions of Article 52 of the Hague Regulations concerning the Laws and Customs of Warfare on Land of 1907.[1] In December 1944, the defendant, into whose possession it had by then come, sold it to the Pensioenfonds for 4,000 guilders. The machine was delivered to the purchaser at the beginning of 1946, but on June 18, 1946, was seized by the Public Prosecutor, who returned it to the Fokker factory. Thereupon the Pensioenfonds sued the defendant for damages.

Held (by the District Court): that the action must fail. The contract of sale was null and void because it infringed certain provisions of Netherlands law, and no claim for damages lay.

The plaintiff appealed.

Held (by the Court of Appeal): that the contract was not void but under Article 1507 of the Civil Code[2] was voidable at the instance of a *bona fide* purchaser. The plaintiff was therefore *prima facie* entitled to damages against the defendant. Since the defendant admitted the purchase by the Pensioenfonds, but contended that the seizure in September 1944 was unlawful, amounting to a theft of the machine, the case was remitted for the Pensioenfonds to adduce further evidence on that issue. The Court stated in express terms that it regarded any dispossession of an owner by the enemy as theft, unless the seizure had taken place in compliance with the relevant provisions of the Hague Regulations or other rules of international law.

[Report: *N.J.*, 1952, No. 620.]

---

[1] Article 52 of the Hague Regulations provides:

"Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

"Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. . . ."

[2] Article 1507 of the Netherlands Civil Code provides:

"The purchase and sale of the property of another person is null and void, and if the purchaser did not know that the property belonged to another person he may have a claim for damages against the seller."

Warfare on Land—Occupation of Enemy Territory—Respect for Private Property—Requisitions—Appropriation of Enemy Property—Booty of War. **Case No. 209**

BERTRAND, MANNÈS AND STATE OF BELGIUM *v.* BONTEMPS, CAMUS AND RAMELOT.

Belgium, Court of Appeal of Liège. May 17, 1951.

THE FACTS.—During the German occupation of Belgium a motor-coach belonging to the respondents was seized by persons acting on behalf of the German authorities; some compensation was apparently given. After the liberation of Belgium the motor-coach was seized by the Belgian State as booty of war, and was subsequently sold to the second appellant and, by him, to the first appellant. The respondents brought an action against the first appellant, to which the second appellant and the Belgian State were joined, for restitution of the motor-coach. The action was based on the Law of January 10, 1941, concerning the restitution of property unlawfully seized by the enemy. The Court of first instance ordered the restitution of the property to the respondent. This was an appeal against that decision. It was contended on behalf of the appellants that the property had lawfully passed to the Belgian State as booty of war.

Held: that the appeal must be dismissed. The Court said: "Unlawful acts within the meaning of the Law of January 10, 1941, are not only those expressly provided for in that Law, such as confiscations and forced sales ordered by the enemy, but any act of spoliation which constitutes a flagrant violation of international law. The Cour de Cassation has even decided that it includes any act of disposal after a requisition, irrespective of whether the requisition itself was lawful (May 20, 1946, *Pasicrisie belge*, 1946, I, p. 199).

"In the present case, the acts were unlawful from the beginning. The requisition was not carried out in the manner required by the Hague Convention. Moreover, the motor-coach was not intended for the use of the army of occupation. The Law of January 10, 1941, is accordingly applicable.

"All further dealings in the property were vitiated by the original illegality. Thus, in order that an object may be seized as booty of war it is not enough that the object in question has been used by the enemy; it must have been his property. In application of that principle, Article 53 of the Hague Convention provides that belligerents may not seize means of transport used by the enemy but belonging to private persons, but must return them and indemnify the owner when hostilities cease.

"In the present case the requisition was unlawful and

Case No. 209 Contd. therefore void. . . . The Law of January 10, 1941, is based on the idea that all arbitrary measures taken by the enemy during the occupation are devoid of legal effects. The German State accordingly at no time obtained the ownership of the vehicle. That vehicle therefore could not be regarded as booty of war, and the Belgian State and its allies never became its owners."

[Report : *Pasicrisie belge*, (1951), II, p. 108.]

Case No. 210 **Belligerent Occupation—Respect for Private Property—Spoliation of Occupied Territory—German Occupation of Norway.**

NORGES BANK (BANK OF NORWAY) *v.*
POLSKI KOMITET AZOTOWY.

Norway, Supreme Court. May 26, 1951.

THE FACTS.—The Polish nitrogen industry was before the Second World War a party to the international nitrogen cartel. The Polish Company was called Comité polonais d'Azote. The Norwegian Company, by the name of Internasjonalt Kvelstoff-aksjeselskap, acted as trustee for the cartel. This Company acted as liquidator of the cartel, when the latter was dissolved at the outbreak of war. It received a large sum of money belonging to the Polish Company. In view of the German occupation of Poland the Norwegian Company found it preferable not to pay the money to the Polish Company but to deposit it for the account of the rightful owner. This was possible in Norwegian law according to a Statute of February 17, 1939. There were, however, certain difficulties. The Company endeavoured to effect the operation by opening a credit for the Bank of Norway in the Banque Nationale Suisse at Zürich in Swiss francs. As the Bank considered it impossible to act in that way, the Norwegian Company opened a separate account in the Bank in Norway and in Norwegian currency and deposited there the sum of 847,811 Kronen. The deposits were made when Norway was still neutral.

After the invasion of Poland, the German authorities in Poland took over the Polish company and appointed a German administrator. Through him the German authorities endeavoured from an early date to appropriate the sums deposited in Norway. The efforts started before Norway was occupied, and became increasingly pressing after the occupation of Norway. The Polish Company claimed throughout that the Bank was not entitled to pay the amount until the courts in Norway had given a final decision on the question of property. In spite of this, and after long delay and many refusals, the Bank of Norway did at last pay the money to the person indicated by the German authorities. This was done on the basis of a decree issued by the Ministry of Justice (part of the

Quisling administration imposed upon Norway by the Germans) on July 28, 1941. The Polish Company now sued the bank for a refund of the sums paid to the German authorities.

At first instance the plaintiff succeeded, on the ground that: "According to the facts before the Court it must be assumed that the German claim to demand the payment of the money was without any foundation in international law and had the character of arbitrary confiscation. Nor could the Bank have had any serious doubt about this. This is probably the explanation of the strategy of the Bank to procrastinate. The plaintiff claims that the payment was only effected after the explicit demand of the Germans—in reality a dictatorial order, based on force, which the Bank could not refuse.

"The Bank could not justify the payment on the basis of Norwegian law at the time since the decree of July 28, 1941, promulgated by the German henchman in Norway—Sverre Riisnaes—is plainly without any effect."

The defendants appealed.

Held (*per* Judge Scher speaking for a unanimous Court): that the judgment of the Court below must be affirmed. Quoting from the Nuremberg Judgments he found that there was no doubt that the German authorities had ruthlessly exploited and tried to destroy the economic potentials of Poland, and that consequently the German appropriation of the assets of the Polish company was a violation of international law and could not be given effect in Norway. The German administrator was neither entitled nor authorized to draw the amounts in question. In the prevailing circumstances, and after the line taken by the depositor in this matter, the Bank of Norway had every reason to view the German efforts with suspicion. The many efforts on behalf of the Bank to escape the payment show that it was aware of this and that the payment of the sums at a later date was due to the difficult position in which the Bank found itself and not due to a change in the opinion of the legality of the German claim.

The Bank should have waited until the courts had decided who was the rightful owner of the money. If it preferred to pay without such a decision, the risk must fall on the Bank.

The Court referred to previous judgments in similar cases before the Norwegian courts as reported in Rt. 1947, p. 235; Rt. 1948, p. 275 and Rt. 1949, p. 357.

[Report: *Norsk Retstidende*, 1951, p. 523.]

NOTE.—The decisions referred to are the following:

(1) Judgment of the Supreme Court of Norway in the case of *Andresens Bank and Bergens Privatbank* v. *Norges Bank* (Rt. 1947, p. 235) of April 26, 1947;

(2) *Kongeriket Norges Hypotekbank* v. *Bergens Provinciallosje and Bergens Frimurerloges Understøttelseskasse* (Norwegian

Case No. 210 Contd.

Mortgage Bank *v.* Two Freemason Institutions), Judgments of the Supreme Court of March 19, 1948 (Rt. 1948, p. 275); and

(3) *Sobral* v. *Bergens Privatbank*, Judgment of the Supreme Court of April 7, 1949 (Rt. 1949, p. 357).

All these cases were concerned with Banks having paid out money to the German authorities or Norwegian authorities controlled by them, against Norwegian law and with no basis in international law. In spite of the force which had been used and the threats employed, the Court found that the Banks were responsible and had to reimburse the rightful owners. In these cases there was a question of Norwegian law only.

Two similar, but not identical, cases were decided by the Supreme Court in 1951, viz. *Trondhjems Sparebank* v. *St. Johs. Logen St. Olav til det Gjenreiste Tempel* (Rt. 1951, p. 727) and *Erling Samuelsen* v. *Norges Bank* (Rt. 1951, p. 905).

Case No. 211

Occupation of Enemy Territory—Right of Occupant to Seize Movables of Occupied Power—Article 53 of Hague Regulations —Right to Transfer Title to Movables Seized—Recognition of Transfer in Law of Occupied Power—Incorporation of Hague Regulations in Municipal Law.

MINISTERO DELLA DIFESA-ESERCITO *v.* SALAMONE.

Italy, Court of Cassation. February 8, 1950.

THE FACTS.—The Allied Forces in Sicily requisitioned two horses from the respondent and, instead of returning them, delivered to him in their place two other horses which, prior to their seizure, had been the property of the Italian army. On appeal from a judgment dismissing the claim of the Italian Ministry of Defence to recover the substituted horses,

Held: that the appeal must fail. The seizure of the horses was legitimate in terms of Article 53 of the Hague Regulations, which forms part of the municipal law of Italy. All title thereto of the Italian State was in consequence extinguished. The Court said in part:

" The Court below sustained the transfer to Salamone by the Military Government of occupied Sicily of two horses, the property of the Italian military authorities, in place of two horses of his own which had been temporarily requisitioned and not returned. Its reason for so doing was its decision that the substituted animals had been duly seized as booty of war by the Allied military forces and the title thereto of the Italian State in consequence extinguished.

" The appeal is based on four propositions which are adduced to establish that a purported alienation of the inalienable property of the State is ineffective and not binding on the latter. Belligerent occupation, the appellant Ministry argues, is a purely factual state of affairs of a transitory character which cannot give rise to definite legal rights. Upon its cessation the occupied State regains its sovereignty and is free to look at the results of acts of the Occupant in the light of its own law. And such acts, be they lawful or unlawful in international law, can have no significance for the internal legal order of the occupied State in the absence of a norm of that order attributing such significance to situations of fact brought about by the occupying State. Here, the seizure of horses by the Allied Military Government, though it may well have been legitimate in international law, can be no more than an extra-legal fact from Italy's point of view, failing any general or special rule of Italian law endowing such acts of the Occupant as are licit in international law with significance in terms of the former system. The Italian State is not, moreover, the appellant contends, under any obligation to make its own law conform to Article 53 of the Regulations annexed to the Hague Convention of 1899, which specifies what property of the occupied State in the power of the Occupant may be appropriated, but does not require any State bound thereby to recognise seizure as booty of war as a source of title to property from the point of view of an occupied State. Further, Salamone has acquired no title under Article 1153 of the Civil Code, whereby *bona fide* possession coupled with a title good in the abstract is constituted a mode of acquisition of property. For goods forming part of the inalienable property of the State can be diverted from their appointed use only by the methods provided by law for their disposal.

" The appeal has no merit. Law 162 of July 20, 1944, concerning the legal régime in territory restored to Italian control, Article 1 of which (re-enacting Article 1 of the earlier Law 31 of February 11, 1944) confirms all acts done by the Allied military authorities under the authority of proclamations of the Military Government or its agencies does not, however, apply in this case. For it does not appear that the handing over of Italian army horses to private persons by way of compensation for the loss of other animals temporarily requisitioned and not returned was effected in pursuance of any ordinance of the Allied Military Government in Sicily. The matter falls rather to be decided in the light of Article 53, paragraph 1, of the Regulations annexed to the Second Hague Convention of 1899 concerning the Laws and Customs of War on Land, implemented by Executive Decree No. 504 of December 9, 1900. Thereunder, 'An army of occupation can only take possession of the cash, funds and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property of the State which may be used for operations of war '. In virtue of this rule of international law, the Occupying Power may seize any movable property belonging to the occupied

Power which has any military utility. It may retain such property or it may transfer it to others if military necessity demands. In this case, the Italian army's horses were not treated as articles of commerce or sale by the Allied military authorities, but were merely assigned to private citizens in place of horses previously temporarily requisitioned and not returned. This substitution was occasioned exclusively by warlike operations. No doubt, since international law and municipal law are distinct and each functions exclusively within its own sphere, an act of an occupying State, though internationally valid, is not an act in the law of the occupied State but a mere fact. The recognition of a rule of international law by the system of Italian municipal law does not, moreover, change the nature of the latter. The régime governing the acquisition of title to property has not been altered as a result of the concession of effectiveness to Article 53 of the Hague Regulations. There has been no legislation in the matter apart from the decree referred to ; and a decree providing merely for the implementation of a treaty cannot produce a specific change in municipal law.

" The international rule in question is incorporated into Italian law in a different fashion. This Court has in previous decisions adopted the accepted theory which is now enunciated in the provision of Article 10 (1) of the new Constitution, to the effect that ' Generally recognised rules of international law are part of Italian law '. And it has held that this rule, although not explicit in the earlier Constitution, is to be considered to have been an implicit principle of Italian law.[1] Hence Article 53 of the Hague Regulations, as a rule of general customary international law re-stated rather than created by the Hague Convention, is to be deemed to have been part of Italian law even before the entry into force of the present Constitution as a result of what may be termed a process of automatic incorporation. That this is the case is incidentally confirmed by the circumstance that Article 60 of the Articles of War (Royal Decree No. 1415 of July 8, 1938) reproduces Article 53 of the Hague Regulations exactly, thus providing that ' Any cash, funds, realizable securities, depots of arms, means of transport, stores, supplies and, in general, all other movable property of the hostile State which may be used for operations of war, becomes the property of the Italian State '. Admittedly this Article contemplates only the case in which Italy is in occupation of the territory of another State. But, the relevant rule of international law having been incorporated into Italian law in its active aspect, it is impliedly incorporated also in its passive aspect. It is not to be supposed that Italian law will adopt a rule of international law only to the extent that that rule operates to the advantage of the State as an Occupying Power and not in so far as it may apply disadvantageously when Italy is in her turn occupied by enemy forces.

---

[1] The Court here referred to its decisions of March 26, 1949, and March 22, 1950, reported in *Mass. Giur. ital.* 1949, col. 182, 195*c*, col. 201 ; *Foro italiano*, 73 (1950), I, 829. As to the latter (*Colorni* v. *Ministry of War*) see *International Law Reports*, 1950, Case No. 138.

"In the instant case the appellant cannot but admit that the right of property in the horses which was originally vested in the State was transferred as a result of their seizure by the occupying forces to the latter, and that it was further assigned by them to Salamone. In these circumstances it is unnecessary to consider whether Salamone may also have acquired a title in virtue of Article 1153 of the Civil Code."

[Report: *Giurisprudenza italiana*, 1952, 1, 1, 441.]

Occupation of Enemy Territory—Right of Occupant to Legislate for Preservation of Public Order—Recognition of Legislation by Courts of Occupied State. **Case No. 212**

MAGRI *v.* DI MARCO.

Italy, Court of Cassation. February 8, 1951.

THE FACTS.—By Ordinance No. 22, dated May 1, 1945, a provincial agency of the Allied Military Government in Italy provided for the setting up of boards to control the price of timber, with powers to dictate the terms of future contracts for the sale of timber and to vary those of contracts already entered into which remained unexecuted. On appeal from a judgment of the Tribunal of Tolmezzo giving damages for breach of a contract which remained executory at the date of the Ordinance,

Held: that the appeal must be allowed. The Ordinance was a legitimate measure of the Occupying Power for the maintenance of public order in the occupied area. In face of it, the Court below should in the instant case have stayed the proceedings pending the fixing of a new contract price. The Court said:

"An occupying Power is entitled to modify by decree or similar enactment the terms of contracts between private citizens when the conditions under which any such contract was originally made have so altered that to compel performance would be to impose an intolerably heavy burden on one of the parties, and would endanger public order by encouraging speculation and illegal hoarding. It is not within the province of the Italian judge to determine whether the enactment of the Occupying Power is in fact effective for the safeguarding of public order. In the light of these principles Ordinance No. 22 of the Provincial Commissioner of the Allied Military

Case No. 212 *Contd.* Government is to be treated as legitimate to the extent that it appears to be expressly or impliedly directed to the maintenance of public order. All rights and obligations arising from an executory contract for the sale of timber are to be considered as from May 1, 1955, as thereby extinguished (*i.e.* with retrospective effect). That Ordinance provides for the appointment by local prefects of authorities having power to fix in advance, or to vary, the terms of timber contracts, in particular as respects price. Having regard to this it is manifest that the Italian Court should suspend judgment pending the fixing of the price by the competent authority."

[Report : *Repertorio Foro italiano*, 1951, 370 E.]

NOTE.—In *Molino* v. *Uff. Trasp. Roma e Soc. Nas. Trasp. Gondrand* the Italian Court of Cassation, upholding the decision of the Tribunal of Rome, *held* that legislative provision made by a belligerent occupant for the purpose of developing and organizing civic activities was wholly legitimate, even from the point of view of the legal order of the occupied country. But the normal rules governing the promulgation and entry into force of enactments do not apply to measures of the Occupant acquiring validity in the occupied territory in this fashion. On these principles the municipal transportation organization for Rome set up by the Allied Military Government by Ordinance dated July 1, 1944, for the exclusive benefit of the civil population, with a view to rationalizing transport, was held to be an entity of public law and its power to lay down general rules regulating transit acknowledged : October 3, 1951 ; *Mass. Foro italiano*, 1951, 632.

Case No. 213

Occupation of Enemy Territory—Right of Occupant to Seize Movables of Occupied Power—Article 53 of the Hague Regulations—Right to Transfer Title to Movables Seized—Transfer to Private Individual with View of Profit.

MINISTERO DIFESA *v.* AMBRIOLA.

Italy, Court of Cassation. June 15, 1951.

THE FACTS.—The Italian Ministry of Defence sought to recover a car, originally its property, which had been requisitioned by the German occupation authorities, sold to a private citizen, and resold to another such citizen. The Judge of first instance had dismissed the proceedings on the ground that the German authorities had acquired a valid and transferable title in virtue of Article 53 of the Hague Regulations concerning the Laws and Customs of War on Land, which formed part of Italian law in consequence both of the implementation of the Second Hague Convention of 1899 by subordinate legislation and of the incorporation of the Hague Regulations in the Italian Articles of War of 1938. The Court of Appeals of Bari upheld this decision. On further appeal, *Held:* that the decision of the Court below must be reversed and the case remitted for re-trial. The Hague Regulations indeed formed part of Italian law, though less for the reasons advanced by the Court below than for reasons of comity. The latter Court, had, however, misapplied Article 53 of the Regulations, which does not entitle an occupant to seize property for purposes of trafficking with individuals. The Court said:

" Proceeding on the theory that the international legal order and the legal order of the State are distinct, each operating exclusively within its own sphere, the Judge of first instance held that the rule of international law enshrined in Article 53 of the Regulations respecting the customs of war annexed to the Second Hague Convention had become part of Italian law by virtue of Royal Decree No. 504 of December 9, 1900, whereby the Convention was implemented, and not merely in virtue of the Articles of War promulgated by Royal Decree No. 1415 of July 8, 1938. The rule in question has indeed become part of Italian law, as writers maintain and as this Court has specifically held in its decision of March 22, 1950, in the case of *Colorni* v. *Ministry of War*,[1] but not for the reason advanced in the judgment of the Court below.

" That rule, involving as it does a modification of the law as to property in movables of both the State and private individuals, requires a statute for its adoption as part of the municipal law of the State. A decree providing for the implementation of a treaty and having, as such, a merely regulatory character, is insufficient for the purpose. But it is not, on the other hand, to be denied that an incorporation of the relevant rule has been effected as a result of the promulgation of the Articles of War of 1938 in so far as the latter lay down a corresponding domestic rule. The domestic rule laid down relates, however, exclusively to the case where foreign territory is occupied by Italian forces. It thus effects the incorporation into municipal law only of rights arising under Article 53 of the [Regulations annexed to the] Convention and not of the obligation imposed by the same Article upon States *qua* subjects of international law to recognise the legitimacy of seizures effected by an enemy Occupant.

" The position is rather that, this Article merely restating rules of customary international law designed to restrain excesses of belligerents and to prevent the infliction of damage or loss not justified by the necessities of war, it is automatically part of our law as a result of the comity of nations. The first head of the decision of the Court below is thus to be sustained. But notwithstanding that the rule contained in Article 53 was thus correctly invoked in this case as part of Italian law, it must be observed that it has been wrongly applied to the particular facts.

---

[1] See *International Law Reports*, 1950, Case No. 138.

Case No. 213 Contd.

" That Article indeed permits occupying forces to seize cash and securities, depots of arms, means of transportation, magazines and stores, and in general all movable property of the occupied State, but only in so far as they may be of use in military operations, and not for purposes of trafficking with individuals. And it is this last which occurred in the instant case, contrary to what was held by the Court below. For the German requisitioning authority attached to the so-called Government of Salò [the puppet régime set up in the German-occupied part of the country after the Armistice between Italy and the United Nations] sold the vehicle the subject-matter of the action (a Fiat motor car registered in Rome on September 8, 1943) to . . . Campamizzi on February 9, 1944.

" That Article 53 is thus strictly to be interpreted in the light of the intention of the Regulations of which it is a part is indirectly confirmed by our post-war legislation providing for the recovery of profits made in any species of transaction between an individual and the German invader. Any interpretation which would permit the recognition as valid of a title to property of the State acquired by an individual by way of transfer from the Germans would be incompatible with the policy of the law. Given, therefore, that, contrary to what was held by the Court below, the German Occupant acquired no property in the car in question and disposed of it wrongfully, the case must be remitted for re-trial by another Judge."

[Report : *Foro padano,* 1951, 1, 1070.]

NOTE.—In *Muhlmann* v. *Bauer,* the Italian Court of Cassation *held* that an act of requisition by an occupying force was illegitimate not only if it failed to conform to the rule laid down in Article 52 of the Hague Regulations of 1899 that requisitions levied upon private persons must be commensurate with the necessities of the occupying force, but also if it amounted to a veritable robbing of private persons under the colour of requisitions, as in the case where goods were requisitioned from one person and sold or otherwise transferred to another : January 20, 1951 (*Mass. Foro italiano,* 1951, 38).

In *Improta* v. *Ranieri,* the Italian Court of Cassation *held,* on appeal from the Court of Appeals of Naples, that the requisition of a house on behalf of a private individual by the Occupying Power was an illegitimate act, having regard to the restriction of requisitions to the needs of the occupying force which Article 52 of the Hague Regulations of 1899 prescribes : June 8, 1951 (*Mass. Foro italiano,* 1951, 354).

In *Soc. Costruzioni Brambilla* v. *Soc. L' Idraulica,* the Italian Court of Cassation, on appeal from the Court of Appeals of Milan, *held* that the examination of a contention that requisitions exacted by an Occupying Power were excessive, involved reference to the Regulations concerning the Laws and Customs of War on Land annexed, respectively, to the Second Hague Convention of 1899 and the Fourth Hague Convention of 1907. These were identical, and recapitulated customary international law. But Italy had ratified only the first of them, and it was therefore that which must be considered to govern requisitions made during the Second World War. In virtue of Article 52 of the Regulations annexed to that Convention, the exercise of the power of requisition was limited in the sense that any requisition made must be made for the necessities of the occupying force. There must exist a relation between the things requisitioned and the army of occupation and its needs, rather than between the former and the general conduct of the war : June 20, 1951 (*Mass. Foro italiano*, 1951, 402).

Belligerent Occupation—Requisition and Sequestration of Private Property—Liability of Bailee of Requisitioned or Sequestrated Property. **Case No. 214**

KOBYLINSKY *v.* BANCO DI CHIVARI.

Italy, Court of Cassation. April 28, 1951.

THE FACTS.—The appellant had deposited with the respondent Bank a chest containing silver. The German occupying authorities issued an order sequestrating the whole of the appellant's property, including the chest. In pursuance of this order the Bank was required to hand over the chest, and in fact did so. The appellant subsequently brought proceedings in the nature of an action for breach of bailment against the Bank, contending that the latter had acted wrongfully both in handing over the chest to the German authorities and in failing to take an inventory of its contents before doing so. The Court of first instance found as a fact that it had been impossible during the occupation either to take such an inventory or to give to the depositor statutory notice of loss of custody by the depository. On appeal,

Held: that the delivery up to a belligerent Occupant, pursuant to an order of requisition or sequestration, of property the subject-matter of a bailment does not engage the responsibility of the bailee where the latter has not failed to take all steps necessary in order to safeguard the ultimate right of the bailor to indemnity and compensation. On this point the Court said :

" The appellant maintains that the Bank is liable for lack of due diligence, having failed both to make an inventory of what was taken by the Germans and to report to him the fact of the taking. This matter cannot be decided unless the legal character of the acts done by the Germans in relation to the appellant's property is first established. There is no doubt that what occurred was that there was a sequestration, effected directly by the German military authorities who were in occupation of Italian territory as from September 18, 1943. Apart from an obligation derived from international law to

Case No. 214 *Contd.* observe certain forms, which were not in fact neglected in this case, an occupying Power may in the exercise of its actual authority proceed in certain cases to the sequestration and requisitioning of the property of private individuals. In pursuance of this power the German military authorities ordered the sequestration of all Kobylinsky's property, including the chest of silver he had deposited with the Bank. And, following this action, those authorities required that property to be treated as having passed into their ownership.

" In these circumstances the depository could not refuse to hand over to the occupying authorities that which had been entrusted to them by a private individual, this being demanded on the basis of a formal order of sequestration promulgated by those authorities in the exercise of the powers derived from their status as belligerent occupants. To have ignored the order as invalid might have led to the application of physical force, or at least to more or less licit measures of forcible execution, such as the Court below found to have been seriously threatened by the Germans. The delivery up of the thing deposited in obedience to an order of this character does not, however, involve the responsibility of the depository unless the latter is guilty of failure to do everything necessary to safeguard the rights of the depositor to ultimate indemnity and compensation. It is in fact denied that there was any failure to take an inventory of the contents of the chest the Germans took (this having been delivered up to the latter together with the documents of deposit), or any failure to send to the depositor the statutory notice of loss of custody. But no question of the materiality of omissions in this regard can arise, in the light of the findings of fact of the Judge of first instance that both the taking of an inventory against the wishes of the Germans and the making of due notification to Kobylinsky would have been physically impossible throughout the whole period of the occupation of Northern Italy."

[Report : *Foro padano*, 1952, 1, 139.]

Case No. 215 **Belligerent Occupation—Requisition of Private Property—Subsequent Transfer to Third Party—Intention of Occupant to Vest Title in Transferee—Whether Transferee Acquires Title—Article 53 (2) of Hague Regulations.**

REQUISITIONED PROPERTY (AUSTRIA) (NO. 1) CASE.

Austria, Supreme Court. April 18, 1951.

THE FACTS.—By order of an officer of the British army of occupation the plaintiff's motor cycle was requisitioned and handed to the defendant. The defendant's own motor cycle had previously been requisitioned, and it was the intention of the officer concerned to transfer the ownership of the plaintiff's cycle to the defendant to compensate the latter for the loss of his own cycle. In claiming the return of his cycle from the defendant, the plaintiff contended that as by virtue of Article 53 (2) of the Hague Regulations the Occupant could not acquire a valid title to the cycle, which was private property, the subsequent transfer to the defendant was incapable of vesting title in the latter. The defendant contended that the plaintiff's title had ceased to exist when the cycle was handed to him, the defendant, in exchange for his own cycle, and that the plaintiff's action should accordingly be dismissed.

Held: that Article 53 (2) of the Hague Regulations applied, and that the Occupant was precluded by that provision from acquiring title to private property ; that it followed that the Occupant did not vest a good title in the defendant, and that the plaintiff was therefore still the owner of his cycle. The Court said :

" The provisions of the Laws and Customs of War on Land (Hague Regulations), of July 29, 1899, form part of the generally recognised rules of international law which apply in Austria by virtue of Article 9 of the Federal Constitution of 1929. According to Article 53 (1) of the Hague Regulations, the occupying army is entitled to requisition certain property the ownership of which is vested in the occupied State. While such property thereupon becomes the property of the Occupying State, the same rule does not apply in the case of private property, including means for the transport of persons or goods referred to in Article 53 (2), because such property has to be returned upon the conclusion of peace, when the question of compensation also falls to be determined. It is not disputed that the plaintiff was the owner of the motor cycle when it was requisitioned. As the motor cycle was the property of a private individual, the Occupying Power did not, in accordance with the Hague Regulations, acquire the ownership thereof by means of the requisition ; nor did the defendant acquire such ownership, notwithstanding that it may have been intended to vest title in him. Therefore, the plaintiff did not lose his title to the cycle as a result of the requisition and subsequent transfer."

[Report : *J.B.*, 74 (1952), p. 266.]

Case No. 216 **Belligerent Occupation—Requisition of Private Property—Purported Transfer by Occupant—Title of Transferee—Rights of Owner.**

REQUISITIONED PROPERTY (AUSTRIA) (NO. 2) CASE.

Austria, Supreme Court. June 20, 1951.

THE FACTS.—The plaintiff was the owner of a motor-car which had been requisitioned by the German army during the war. After the conclusion of hostilities in Austria it was seized by the British occupation authorities, who erroneously believed it to be the property of the German army. The British authorities accordingly regarded the motor-car as booty and handed it to the Austrian authorities. The latter subsequently handed it to the defendant, intending to transfer the ownership to him. The plaintiff now claimed the return of the motor-car from the defendant, on the ground that as the title of the British authorities was bad, neither the transfer by them to the Austrian authorities nor the transfer by the latter to the defendant was capable of vesting the property in the motor-car in the defendant. The defendant contended that the British authorities, in the exercise of their right to seize as war booty property in the possession of the German army, had acquired a good title, with the result that all subsequent transfers were capable in law of vesting the property in the transferee, and that accordingly he was the rightful owner of the motor-car.

Held: that as the motor-car was owned by a private individual and not by the German armed forces, the Occupant was not entitled to seize it as war booty ; that, accordingly, the Occupant had not acquired a good title which he could subsequently transfer, and that the plaintiff was still the rightful owner and entitled to the return of the motor-car. The Court said :

" In accordance with Article 53 (1) of the Hague Regulations, the occupying army is entitled to seize certain goods which are the property of the occupied State, whereupon such goods become the property of the occupying State. The seizure of property referred to in Article 53 (2) of the Hague Regulations and belonging to private individuals, including property used for the transport of persons and goods, does not result in a change of ownership, because such property has to be returned upon the conclusion of peace. Having regard to the fact that the motor-car forming the subject-matter of this action was the property of the plaintiff, *viz.* of a private individual, the British Occupying Power did not, according to the Hague Regulations, acquire ownership therein by means of the seizure, and it was therefore unable to transfer ownership to [the

Austrian authorities]. The right of ownership is equally lacking in the person of the defendant, even though the Austrian authorities may have intended to transfer such ownership to him. In view of the fact that the right of ownership was not vested in the Austrian authorities, they were unable to transfer any right."

[Report: *J.B.*, 74 (1952), p. 343.]

Belligerent Occupation—Requisition of Land by Occupant—Compensation Assessed by Authorities of Occupied Country—Whether Assessment Constitutes an Administrative Decision of the Occupant or of the Authorities of the Occupied Country—Right of Appeal against Assessment to Courts of Occupied Country—The Law of Austria.

Case No. 217

VEREINIGTE ÖSTERREICHISCHE EISEN- UND STAHLWERKE (VOEST) A.G. *v.* FEDERAL MINISTRY OF FINANCE.

Austria, Administrative Court. November 28, 1951.

THE FACTS.—In so far as here material, Austrian law provides that a person aggrieved by the decision of an administrative authority may appeal against that decision to the Administrative Court. In the present case the appellants, who were the owners of certain land requisitioned by the United States army of occupation for the purpose of housing prisoners of war detained by the United States armed forces, appealed against the assessment of the compensation they were to receive for the user of their land. The amount had been assessed by the competent Austrian Ministry. The appellants contended that as persons aggrieved by the decision of an administrative authority, they were entitled to appeal. The Ministry, respondents herein, contended that as the land had been requisitioned by the Occupant the Austrian authorities, notwithstanding that they had assessed the amount to be paid to the appellants, had acted by order and in the name of the Occupant, and that accordingly the appellants were not aggrieved by a decision of an Austrian administrative authority, which alone would entitle them to appeal.

Held: that as the Ministry had acted by order and in the name of the Occupant, the Administrative Court lacked jurisdiction to hear the appeal. The Court said:

"The land was requisitioned by the Occupying Power within the latter's own sphere of competence. The requisition is therefore based exclusively on the authority of the Occupying Power, and not on any Austrian law. In so far as the Austrian authorities grant compensation in respect of such requisitions, they act by order and in the name of the Occupying Power, and

Case No. 217 *Contd.* not in the execution of any law forming part of the Austrian legal system. Their decisions are not therefore decisions subject to the scrutiny of the Administrative Court."[1]

[Decision No. 1060, 1061/49/5 (not reported).]

Case No. 218 **Belligerent Occupation—Requisition of Property—"Pay As You Go" Agreement between United States of America and Austria—Failure of Austrian Government to Pay Rent for Requisitioned Premises in accordance with Agreement—Whether Owner Entitled to Institute Proceedings against Austrian Government.**

BÄCKER *v.* AUSTRIAN FEDERAL TREASURY.

Austria, Supreme Court. February 1, 1951.

THE FACTS.—The respondent (plaintiff in the Court of first instance) was the tenant of a flat in Vienna which was requisitioned by the United States army of occupation. By an Agreement concluded between the Governments of the United States and the Republic of Austria on June 21, 1947,[2] the latter Government undertook to pay the rent due on property requisitioned by the United States armed forces. The plaintiff, who had received no rent for his flat, accordingly brought this action against the Austrian Treasury. It was contended on his behalf that the Agreement between the two Governments conferred on him the right to demand payment of rent from the Austrian Treasury, on the ground that the Agreement was in the nature of a "contract for the benefit of a third person" within the meaning of the relevant provision of the Austrian Civil Code. On behalf of the Austrian Treasury, it was contended that the requisition of the plaintiff's flat was a sovereign act of the Occupant and therefore incapable of giving rise to a claim of a contractual nature, and that the civil courts were not entitled to exercise jurisdiction in the matter.

Held: that the requisition of the plaintiff's flat was a sovereign act of the Occupant, and that the courts were not entitled to exercise jurisdiction over the plaintiff's claim. The Court said:

---

[1] The part of the judgment here reproduced is concerned only with the user of the appellants' land from July 1, 1947, onwards. In so far as concerns the period from April 9, 1945, until June 30, 1947, an Agreement between the Government of the United States of America and the Government of the Republic of Austria provided for the payment of a fixed sum of money by the United States of America, out of which the Austrian Government undertook to pay, *inter alia*, compensation for the use of land by the United States armed forces, such compensation to be agreed between the Austrian Government and the owners concerned. The Court held that disputes concerning compensation payable in respect of that period fell within the competence of the civil courts. (The Agreement referred to is the Claims Settlement Agreement of June 21, 1947 (*U.N.T.S.*, Vol. 67, p. 89).)

[2] *Ibid.*

" A claim against the Republic of Austria to compensate a person in respect of the user of immovable property by an Occupying Power belongs to the realm of public law ; it cannot be asserted in the civil courts. In no circumstances can the Agreement between the Austrian Government and the United States Occupying Power be regarded as a contract for the benefit of third parties. Nor can a claim against the Occupying Power for indemnity in respect of the user of immovable property requisitioned by such Power be regarded as belonging to the realm of private law, even if it is described as rent. The Occupying Power acts in the capacity of a sovereign authority when dealing with the owner of requisitioned property. Similarly, the Austrian Government concluded this Agreement with the American Occupying Power in the capacity of a sovereign authority, and it is as a sovereign authority that it discharges the obligations which it has undertaken in these ' inter-State ' Treaties. It is not therefore permissible to derive from this Agreement a civil claim within the meaning of s. 881 of the Civil Code, which would be vested in the plaintiff as against the defendants and in respect of which the civil courts would be open to him."

[Decision No. 2 Ob 829/50 (not reported).]

Belligerent Occupation—Requisition of Private Property—Subsequent Sale by Occupant—Whether Purchaser Acquires Title—Article 53 of Hague Regulations—Booty—Right of Municipal Courts to Inquire into Transfer of Title by Occupant. **Case No. 219**

BOOTY (REQUISITIONED CAR) CASE.

Austria, Supreme Court. May 16, 1951.

THE FACTS.—The plaintiff was the owner of a motor-car which was used by an official of the German Labour Front in Austria during the years 1944 and 1945. Shortly before the end of hostilities in Austria the car was being returned to the plaintiff when it was forcibly taken by an officer of the German " Waffen S.S.", who subsequently abandoned it. In 1946 one, H. bought the car from an official of the French army of occupation, and shortly thereafter the defendant bought it from H. The plaintiff claimed that he was still the owner of the car, and brought an action against the defendant for its return. On behalf of the defendant it was contended that the car had become the property of the German army when it was forcibly taken by an officer of the " Waffen S.S.", and that it had subsequently been seized as booty by the French army ; that the latter had thereby acquired a valid title to the car which it had transferred to H., who in turn had transferred it to him,

Case No. 219 *Contd.*

with the result that he, the defendant, was now the rightful owner.

Held: (i) that while it was true that title to booty could be transferred by the Occupant, the plaintiff's car was not booty because the German army had never acquired a valid title thereto; but

(ii) that the sale of the car by the French army was a sovereign act of the Occupant which was binding on the Court, and that by this sovereign act the Occupant had transferred a valid title to H., who in turn had transferred a valid title to the defendant, and that the plaintiff's claim must be dismissed. The Court said:

" In principle, the Occupying Power can acquire and transfer property if such property was last in the ownership of an enemy State. The car did not, however, become the property of the German army by virtue of being taken by force by an officer of the S.S. In contradistinction to Article 53 (1) of the Hague Regulations, which deals with the right of the victorious State to take booty, no such right exists *vis-à-vis* the civilian population of an occupied State. On the other hand, Article 53 (2)—which is an exception to the general rule of inviolability contained in Article 46—permits the requisition of private property intended for the transport of persons or goods. By requisitioning property the Occupying Power merely claims the right to deal with the substance and fruits of the requisitioned object according to its own wishes and to the exclusion of all others. It is a necessary condition of any requisition by an Occupying Power that such requisition shall have been made by a duly authorised member of the Occupying Power. In this case the lower Courts have found that the car was sold to H. by the '*direction du service de matériel du corps d'occupation en Autriche*', which makes it unnecessary to require proof of prior requisition by the Occupying Power. We are here concerned with a sovereign act of the Occupying Power into which the Austrian courts cannot inquire. The sale by the Occupying Power constitutes an act which is binding on the courts. By virtue of it H. acquired a valid title which he could transfer to the defendant, irrespective of whether H. and the defendant knew that the car was the private property of an Austrian citizen before the Occupying Power exercised rights over it. The plaintiff cannot maintain this action as the owner of the car."

[Report: *J.B.*, 74 (1952), p. 138.]

Belligerent Occupation—Respect for Private Property—Unlawful Removal of Private Property—Cover by War Risks Insurance.

See Case No. 151 (*American Business Machines Corporation* v. *Onderlinge Oorlogsschadeverzekering Maatschappij*).

Belligerent Occupation—Respect for Private Property—Seizure of Means of Transport.

See Case No. 205 (*Anciens Établissements Graf Frères* v. *Société la Mure*).

Appropriation of Enemy Property—Booty of War—Property Originally Seized in Violation of International Law—Whether Constituting Booty.

See Case No. 209 (*Bertrand, Mannès and State of Belgium* v. *Bontemps, Camus and Ramelot*).

iv.—Inhabitants. Services. Deportations. Hostages

Belligerent Occupation—Treatment of Civilian Population—Arbitrary Imprisonment—" Protective Custody ". **Case No. 220**

In re Hofmann.

Holland, Special Criminal Court.

Special Court of Cassation. December 19, 1951.[1]

The Facts.—Hofmann, a German police officer who was stationed at Rotterdam during the German occupation of Holland, was charged with arbitrarily imprisoning innocent civilians by way of " protective custody ".

Held (by the Special Criminal Court) : that the accused was guilty. The Court said :

" Under the Hague Regulations of 1907 it is unlawful for the German Occupant to apply the system of taking into *Schutzhaft* (protective custody) political opponents in occupied territory who were not suspected of having committed a punishable offence. The Occupant is under an obligation, subject only to overriding necessity, to observe the law obtaining in the occupied territory respecting the powers of the national police force. The laws of the occupied territory will, it is true, generally remain, in the interest of the population, the basis of the exercise by the national police officers of their

---

[1] This was the last case adjudicated upon by the Special Court of Cassation. Its jurisdiction over the few remaining prosecutions for war crimes was transferred as from January 1, 1952, to the Supreme Court.

Case No. 220 *Contd.* normal police duties, subject to such expansion of their normal powers as may be necessary under the extraordinary conditions inseparable from the war and from military occupation. The situation is different, however, with regard to such police measures as the Occupant considers necessary for the furtherance of his own military interests in the occupied territory. The Occupant is not entitled, on the one hand, to charge the local police authorities with the task of carrying such measures of his into execution so that, in effect, they take an active part in the war against their own country, nor is he bound, on the other hand, in the enforcement of his own police measures, by the laws of the occupied territory ; he is subject, in this respect, to the rules of the law of nations only." On appeal,

Held (by the Special Court of Cassation) : that the appeal must fail. The Court said :

" An Occupant is generally competent to enforce police measures for the protection of the occupying forces or for the furtherance of other military interests of his own, but he is bound to secure their execution by police organs which are subordinate to the military commander of the occupied territory. Moreover, the scope of the special police measures thus to be taken by the Occupant himself must be confined to the limits set by the law of nations. These limits are passed when the Occupant detains inhabitants of occupied territory who are not suspected on reasonable grounds of having committed punishable offences and on the sole ground that they appear, or are even only presumed, to be political opponents of the Occupant. No express prohibition to this effect can, it is true, be found in the text of the Hague Regulations, but the illegal character of such a system of arbitrary detention of civilian inhabitants of occupied territory can be deduced from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience."

[Report : *N.J.*, 1952, No. 73.]

Case No. 221 **Belligerent Occupation—Civilian Inhabitants—Requiring Inhabitants to Assist in Suppression of Guerrilla Activities.**

PEOPLE OF THE PHILIPPINES *v.* HIGINO SIGUE.

Philippines, Supreme Court. April 18, 1950.

THE FACTS.—The accused was a member of a police group, organized by the Japanese occupation forces, which arrested a number of guerrillas in August 1943. He was convicted of treason and sentenced to life imprisonment. On appeal, the accused contended that measures of the occupying forces for the maintenance of public order were lawful, and that inhabitants of the occupied territory may be required to assist the Occupant in this respect.

Held: that the judgment of the Court below must be affirmed. The enemy has no right to require inhabitants of the occupied territory to assist in the repression of resistance. The Court said :

" Counsel for appellant further contends that, even admitting the testimony of the witnesses for the prosecution to be true—that appellant took part in the arrest of the guerrilla suspects herein mentioned—such acts of the appellant were legal and legitimate because the *de facto* Government set up here by Japan during the war could legally adopt all measures tending to ensure public order and safety ; that under international law that Government could avail itself of the services of the inhabitants of the occupied territory and that the latter might not refuse to render such service ; and that it was in such capacity that the appellant served as a special policeman.

" Such contention is untenable. The enemy had no right to require the citizens of the occupied territory, and the latter were not bound, to betray their own country by helping the enemy to liquidate those of their fellow-countrymen who resisted and fought the invader."

[Report : 47 Off. Gaz. 5672 (1951).]

Belligerent Occupation—Effect on Enemy Character of Residents of Occupied Territory—Persons Living Across the Line of War—The Law of Hong Kong—The Law of England.

See Case No. 162 (*Hangkom Kwingtong Woo* v. *Liu Lan Fong*).

C—WARFARE AT SEA

IV.—Prize Law

i.—Nature and Extent of Jurisdiction of Prize Courts

Case No. 222 **Prize Law—Meaning of Capture—Whether Capture of Port Includes Vessels Therein—Whether Act of Conscious Volition—Unfinished Structures—Whether Subject to Capture in Prize—Whether Shipbuilding Yard Part of Port—Capture after Termination of Hostilities—Meaning of Surrender and its Effect on Belligerent Rights—Whether Surrender Equivalent to Armistice—German Unconditional Surrender of 1945—Meaning of Allied Declaration of June 6, 1945—Effect on Belligerent Rights.**

THE HERMES AND OTHER STRUCTURES.

England, High Court of Justice (*Admiralty Division, in Prize*).

(Lord Merriman P.)

May 10, 1951.

THE FACTS.—This was an application by the Crown for condemnation as prize of the motor vessel *Hermes* and four hulls in the course of construction.

The port of Emden was captured and occupied by the Canadian Army on May 6 and 7, 1945, when the *Hermes* was lying in the water incomplete, damaged and grounded. The application in respect of her was resisted on behalf of the Dampfschiffahrts-Gesellschaft Neptun, who claimed the release of the vessel to them. There was no formal act of seizure in prize of the *Hermes* when Emden was captured. There was a total surrender of the German armed forces on May 8. The remainder of the facts are stated by Lord Merriman P., in his judgment, as follows: " The writ was issued on August 13, 1947, and describes [the *Hermes*] as a ship whose port of registration is unknown, and as having been seized and taken as a prize by H.M.S. *Royal Rupert.* Lieut. Clayton, an officer in H.M.S. *Royal Rupert,* swore on July 21, 1947, that he had been present at the capture of the *Hermes* lately taken by H.M. Ship of War. He swore that Klaus Dehde was her master or commander. A letter from Herr Dehde, dated Emden, July 23, 1947, is exhibited to one of the later affidavits. In this he says that she was seized by the Royal Navy as prize on July 21, 1947, and that he was made master of her for this act by the port controller, Mr. Cawthorne. As to this performance, save that I would substitute the word ' farce ' for the word ' act ', comment is needless in light of what is now admitted to have been the true position for more than two years before that date. Yet it was not until July 8, 1949, that the Procurator-General wrote to the claimants' solicitors to say that the Crown would contend that the vessel was seized when the port of Emden was captured and occupied on what was said, incorrectly, to be May 5, 1945, and would rely in this connexion on the decision in *The Bellaman and The Agostino Bertani* ([1948] W.N. 370) but would not rely on the seizure which took place in 1947, by reason of the surrender of Germany and the Allies' declarations and other documents relating to the German surrender as well as of the decision of the Allied Military Control, this vessel and others had become in any event the property of His Majesty's Government.

" Hull 347 and Hull 348 were still on the stocks at Lübeck when that port was occupied by military forces on May 2, and by naval forces on May 3. Hull 347 was almost ready for launching. About 70 per cent. of Hull 348 was completed but the outer sides and decks were only partly riveted. In determining whether they came within the definition and character of a ' ship ', it was unnecessary to draw any distinction between those structures.

" Hull 507 and Hull 508 were on the stocks at Flensburg. Their state of construction was considerably less advanced. The ribs of Hull 507 were in position and half the plating was completed ; the double bottom of Hull 508 had been laid and half the ribs were up. For the purposes of the present claims no distinction could be drawn between them. Flensburg was occupied by combined naval and military forces on May 10.

" On behalf of the claimants it was contended, with regard to the *Hermes*, that that vessel was not seized in prize when Emden was occupied by the Allied forces ; that the rights of belligerents to seize in prize ceased on the surrender of Germany; that there was no formal act of seizure before that, the material time ; and that, after that date, there could not be any lawful seizure in prize. With regard to the Lübeck structures and the Flensburg structures, that for the same reasons there could be no lawful seizure in prize after the surrender of Germany, and also that they were not in such a state of construction as would bring them within the definition of ' ship ' for the purposes of the law of prize ; and that in any event the four hulls were on the stocks in building yards and the yards did not form any part of the port and the hulls were not proper subjects for capture or seizure in prize. The Lübecker Flenderwerke A.G., the building owner[s] of Hulls 347 and 348, claimed that they were entitled to the release to them of those hulls. The Schiffahrts Treuhand G.m.b.H. claimed similarly in respect of Hulls 507 and 508."

Held: that the *Hermes* and all the structures were good and

Case No. 222 *Contd.*

lawful prize, there having been a hostile capture of the ports in which they lay.

Lord Merriman, P., said: " The questions for decision, it is agreed, may be stated as follows: (I) Were the ports in question respectively occupied in circumstances and at a time which permitted the exercise of any belligerent rights of prize therein? (II) If the ports were captured when they were respectively occupied, was their capture of such a nature as, *ipso facto*, to effect the capture of these objects respectively? (III) Were the Lübeck and Flensburg structures a proper subject of maritime prize or were they merely private property on land and, therefore, protected from confiscation by virtue of article 46 of The Hague Convention IV? (IV) In any event, assuming that for any of the above reasons any one or more of these objects is not liable to condemnation as good and lawful prize and therefore must be released, ought they nevertheless to be released to the Crown and not to the claimants because, as was said in the letter of July 8, 1949, from the Procurator-General to the claimants' solicitors, they have in consequence of the assumption of the government of Germany by the Declaration of June 5, 1945, and of what is the equivalent of German legislation thereunder, become the property of the Crown?

" (I) The first question chiefly depends on the dates on which the ports were occupied respectively. It is conceded that this question must be answered in the affirmative as regards Lübeck. It is disputed, as regards both the other two ports, by reason of the surrender to Field-Marshal Montgomery at Lüneburg on May 4 of the north-west area of Germany and, in any event, as regards Flensburg by reason of the documents of the total surrender of the German armed forces, signed respectively at Rheims on May 7 and Berlin on May 8, 1945. As Emden was occupied before either of these two later dates and Flensburg was occupied after both of them, it is immaterial whether May 7 or May 8 is taken as the date of the total surrender. Both these documents imposed on the Germans a cessation of active hostilities at 23.01 hrs. Central European time on May 8. May 9 was the date celebrated in this country as 'VE Day'.

" Counsel on behalf of the Crown was content to take this as the relevant date. Earlier in the argument Sir Hartley Shawcross suggested that by reason of a statement in all the documents of surrender that these were independent of and without prejudice to, and would be superseded by, any general instrument of surrender imposed by or on behalf of the Allied Powers and applicable to Germany and the armed forces as a whole, or words to the same effect, the relevant date is June 5, when the Declaration embodied in Cmd. 6648 was made. As I have already said I agree with this view that, for the reasons already given, belligerent rights of prize could not subsist after that date; but it does not follow from this that if a total surrender itself operates to bring these rights to an end they subsisted until that date. My opinion is that Mr. Le Quesne was right in accepting May 8 as the latest relevant date for the total surrender.

"In my opinion the true effect of the Declaration of June 5, 1945, was to recite the total surrender of the German armed forces which had already taken place and to impose on the German people the government of the Allies in consequence of that surrender. This issue, therefore, is narrowed down to the question whether His Majesty's forces could exercise belligerent rights of prize in Flensburg, whether May 4 or May 8 is taken as the date of total surrender in that area, and, as regards Emden, whether those rights survived the Lüneburg surrender on May 4. As to this point, it is true that the surrender to Field-Marshal Montgomery was a complete surrender of the German forces in the XXI Army Group Area, in which all three ports were situated. But, on any view of the matter, I do not think that this surrender can be described as a general cessation of hostilities. The very fact that the rest of the German armed forces did not surrender until three or four days later implies that they might attempt to carry on hostilities in that area, if only by air. In my opinion, therefore, May 8 is the only date that matters. If so, the issue is further narrowed to the occupation of Flensburg. But, whether I am right or wrong in this respect, the question of principle remains to be determined.

"As to this, the claimants' argument may be summarized as follows: it is at the very least doubtful whether the exercise of belligerent rights in prize is permitted during an armistice, unless they are expressly reserved; and, seeing that an armistice is a mere suspension of hostilities, so much the less can the exercise of these rights be permissible after a total surrender, which involves an absolute cessation of hostilities. The argument is attractive at first sight, but it requires an examination of the question whether a total surrender is merely an armistice in a permanent form or whether, as the Crown suggests, the two things are of an essentially different nature.

"In considering the essential characteristics of a surrender, it may not be inapt to begin with a simple example. Under the threat of the guns of the captors' ship, a vessel strikes her colours: does that necessarily mean that the capture is complete at the moment when she does so, and that, for example, putting a prize crew on board is not a hostile action because in fact no further opposition is offered? In *The Rebeckah* ((1799) 1 Ch. Rob. 227) the question was whether the capture was a droit of Admiralty or was prize to the naval captors. This depended on whether the ship was captured when lying at anchor in a port or haven, or whether the capture was made by naval officers in their naval character.

Case No. 222 ***Contd.***

"Sir William Scott there said (*Ibid.* 233): 'The first question that will occur applies to the time of the capture, whether that is to be dated from the actual taking possession, or the previous striking of the colours; and I think that the striking of the colours is to be deemed the real deditio. If the French had succeeded in their attempt to defeat that surrender, then the actual final taking of possession must have been alone considered. But as that attempt failed, I am of opinion that the act of formal submission, having never been effectively discontinued, must be deemed the consummation of the capture.' Sir William Scott, having also determined that the surrender was made not in the roadstead but when the vessel was only about to enter it, and having dealt with other points which have no bearing on the question at issue, condemned the vessel to the captors in prize.

"In *The Edward and Mary* ((1801) 3 Ch. Rob. 305), a claim for prize salvage of a British merchantman taken by a French privateer, Sir William Scott said (*Ibid.* 306): 'The master, I must observe, has given an improper deposition, and very ill according with the entries in his log-book: By that it appears that the French vessel brought him to, and declared herself a French privateer, and ordered him to lie to; but owing to the boisterous state of the weather, she did not send a man on board. I can by no means agree to what has been advanced in argument, that it was on this account *no capture*. The sending of a prize master on board is a very natural overt act of possession, but by no means essential to constitute a capture. If the merchantman was obliged to lie to and obey the direction of the French lugger, and await her further orders, she was completely under the dominion of the enemy; there was no ability to resist and no prospect of escape. The Frenchman, who has been examined, appears to have given the true account: he says "that he understood it to be a capture". There have been many instances of *capture* where no man has been put on board, as in ships driven on shore, or into port.'

"But in my opinion it does not follow from these cases that hostilities between the captor and the captured ship cease at the moment when the prize strikes her colours, and that the overt act of taking possession is a peaceable act distinct from the capture. This very question arose in *The Pellworm* ([1922] 1 A.C. 292), which decided that when an enemy merchant ship had hauled down her flag on the approach of a British cruiser outside neutral territorial waters, but had succeeded in manœuvring herself within territorial waters before she was boarded and taken possession of by a prize crew, the capture was within the territorial waters and the prize could not be retained.

"In giving the judgment of the Privy Council, Lord Summer said (*Ibid.* 302): 'In principle it would seem that capture consists in compelling the vessel captured to conform to the captor's will. When that is done, deditio is complete, even though there may be on the part of the prize an intention to seize an opportunity of escape, should it present itself. Submission must be judged by action, or by abstention from action; it cannot depend on mere intention, though proof of actual intention to evade capture may be evidence that acts in themselves presenting an appearance of submission were ambiguous, and did not result in a completed capture. The conduct necessary to establish the fact of capture may take many forms. No particular formality is necessary: *The Esperanza* ((1822) 1 Hag. Adm. 85, 91). A ship may be truly captured, though she is neither fired on nor boarded (*The Edward and Mary* (3 Ch. Rob. 305)), if, for example, she is constrained to lead the way for the capturing vessel under orders, or to follow her lead, or directs her course to a port or other destination, as commanded. If she has to be boarded, she is at any rate taken as prize when resistance has completely ceased. It was contended before their Lordships by counsel for the Crown that hauling down the flag was conclusive in the present case, or at least was conclusive when taken in conjunction with stopping the engines as ordered. It was said to be an unequivocal act of submission, as eloquent as the words "I surrender" could have been, an act which could not be qualified by any intention that did not find expression in action.

"'This is to press *The Rebeckah* (1 Ch. Rob. 227) beyond what it will bear, for there the facts showed that, after the act of formal submission by striking colours, there was no discontinuance of that submission either effectively or at all, whereas Sir William Scott intimates that, if any attempt had been made to defeat the surrender, he would not have treated the deditio as complete till possession was actually taken. It is true that by tradition, when ships are engaged in combat, striking the colours is an accepted sign of surrender, but to do so without also ceasing resistance is to invite and to justify further severe measures by the victorious combatant. In the case of a merchantman, where the traditions of commissioned men-of-war are not of equal application, the hauling down of the flag, like any other sign or act of submission, is to be tested by inquiring whether the prize has submitted to the captor's will. What a combatant seeks to intimate by acts signifying surrender is first and foremost that he ceases to fight and submits to be taken prisoner; what a merchantman intimates is, that she means to do as she is told, and that the chattel property may be captured in prize, though the seamen in charge of it are not made prisoners, or placed under personal restraint.'

"Likewise, when a solitary seaboard fortress with its adjacent port is besieged by naval or naval and military forces, what difference can it make whether entry is effected by a landing party, vi et armis, through a breach in the walls made

Case No. 222 *Contd.* by the guns of the invading fleet, or unopposed through the city gates after a white flag had been hoisted over the citadel? No such distinction, as far as I am aware, has been drawn in prize law, and *Lindo* v. *Rodney* (2 Doug. 613 (n.)) and the case of the *Ships taken at Genoa* ((1803) 4 Ch. Rob. 388), which were both cases of capture of ports on surrender, are authorities to the contrary. But it is argued that in such cases the surrender was an isolated act while hostilities still continued over the theatre of war generally. Be it so. This seems to be merely saying that although the unopposed occupation of an isolated port which has surrendered unconditionally may properly be regarded as the capture of that port, the simultaneous hoisting of white flags, metaphorically speaking, in every such port within the whole theatre of operations involves the conclusion that no one of them can be said to be captured. In the absence of any authority for this proposition I am unable to accept it.

" But it is said further that a total surrender whereby the vanquished enemy is obliged to cease hostilities imports an implied contract on the part of the victors to cease hostilities likewise; and that it follows therefrom that from the moment of surrender capture in prize cannot properly take place. If this is the true effect of a general surrender, why is it not equally true of the local or individual surrender whether of a ship or of a seaboard fortress? It is true that the ship may be rescued, or that the tables may be turned, as in the case of the *Ships taken at Genoa* (4 Ch. Rob. 388), by a victory of the enemy elsewhere; but until either of these events happens how can it be said that the imposition of the will of the victor upon the fortress or ship is either more or less hostile in character than the imposition of the will of the victor upon the totality of similar fortresses or ships throughout the enemy's territory?

" This may be tested by considering what happened to these ports after the surrender. So far from there being any obligation upon the Allies to lay down their arms, it is, I think, indisputable that, as in the case of the boarding party on the one hand or the landing party on the other, the naval and military forces which occupied these ports advanced, figuratively speaking, in full panoply with all appropriate precautions to guard against surprise and if necessary to impose their will on the surrendered enemy. Even if no force was openly displayed, it was there in reserve.

" If I may be permitted to paraphrase the concluding passage quoted from Lord Summer's judgment in *The Pellworm* ([1922] 1 A.C. 292) in terms of this case, I would do so as follows: ' What the commanders of the German armed forces sought to intimate by acts signifying surrender was, first and foremost, that they ceased to fight and submitted to being taken prisoner, and in relation to their ports, to intimate that they meant to do as they were told and that the maritime property therein might be captured in prize although those in charge of it were not made prisoners or placed under personal restraint '. The affidavit of Captain Petrie proves that measures were taken in these ports which were almost exactly analogous to putting a prize crew aboard a captured ship. The barbed wire fences, it is true, were not put up to imprison the Germans found in the ports, but they were put up to stop them from interfering with any maritime property therein. This, it seems to me, is the very antithesis of an implied contract that both sides shall refrain from any hostile act, and bears no resemblance to an armistice arranged on the terms that neither side shall do any belligerent act so long as it lasts.

" It is, of course, well settled that belligerent rights in prize end with whatever may be the true cessation of hostilities : *The Harmony* ((1815) 2 Dods. 78). The headnote in this case reads : ' The Prize Court of Admiralty has jurisdiction over cases of seizure as prize, although the same may have been effected after the time prescribed for the cessation of hostilities by a treaty of peace '. To understand the point of the case it is essential to consider the relevant facts. As appears from a note on p. 56 of the same volume, the Treaty of Peace between Great Britain and the United States of America was signed on December 24, 1814, and was finally ratified on February 17, 1815. By one of its clauses it was agreed that, immediately after the ratification of the treaty by both parties, orders were to be sent to the armed forces and citizens of the two powers to cease from all hostilities and, to prevent causes of complaint which might arise on account of the prizes which might be taken at sea after the ratification, it was agreed that all vessels taken in the relevant part of the Atlantic Ocean after thirty days from the ratification should be restored on each side.

" The *Harmony*, a British ship with a British cargo, was captured by an American privateer on March 2, 1815, who took away the master and the rest of the crew except the mate, and sent an American prize master, another American and five Frenchmen on board with directions to take the vessel to a port in the United States. On March 24, 1815, the mate, having previously ascertained that the Frenchmen would not oppose him, cut down the prize master with a hatchet and threw him overboard. He then brought the ship and cargo to England, where he caused both to be arrested in a suit for prize salvage by reason of recapture from the enemy. On May 6, the court decreed restitution to the owners of the vessel and the owners of the cargo respectively on payment of 1,390*l.* to the prize salvor. Later, however, a claim was entered on behalf of the American captor and monitions were issued to show cause why the *Harmony* should not be decreed to be released from the recapture as having been effected after the time specified in the treaty of peace for the termination of hostilities, and why

Case No. 222 *Contd.*

the same should not be delivered up to the claimant on behalf of the American captor.

" After various proceedings which are irrelevant, and in spite of the submission by the owners of the vessel and the cargo that the prize court had no jurisdiction and that only an appellate court could set aside the original release to them, Lord Stowell held that he had jurisdiction to recall his original decision and that the original decree of restitution upon salvage ought to have no effect, and he ordered that ship and cargo be released from the recapture and delivered to the master of the American privateer. The significance of the judgment is that although Lord Stowell held that belligerent rights of prize had ceased at the date of recapture, he had jurisdiction to release the ship and cargo to the original captor although their capture was effected after the ratification of the peace treaty, but within the thirty days of grace. Rightly understood, this decision does not help the claimants.

" But then, it is said, where is the line to be drawn ? Is it to be suggested that the victors can continue seizing ships and goods in prize until the peace treaty is signed—it may be years later ? I do not consider that any such conclusion necessarily follows. I do not doubt that short of the signing of a peace treaty victors may abrogate, expressly or impliedly, any rights that they have jure belli, including rights of prize. However that may be, in these cases it is conceded that such rights were abrogated by the Declaration signed at Berlin on June 5, 1945, but I see no reason for holding that the Crown had lost these rights because of anything which occurred before that date.

" (II) On the question whether the capture of these ports was of such a nature as *ipso facto* to effect the capture of these objects respectively, the claimants put their case on three grounds ; first, they submit that capture must be an act of conscious volition, and that, even in the case of the *Hermes*, which is admittedly a proper subject of prize capture, the history which I have related regarding her, taken with other matters to which I will refer, proves that it was not the intention of His Majesty's forces to seize her in prize when they occupied Emden, but on the contrary, her capture and seizure were expressly deferred to a time when no prize rights existed. Further, that everything that can be said in this respect with regard to the *Hermes* applies with even greater force to the Lübeck and Flensburg structures. As regards the Lübeck and Flensburg structures : secondly, it is submitted that their very nature leads to the opposite conclusion ; and thirdly, that a shipbuilding yard and the stocks whereon ships are being built cannot be said to be part of a port.

" I will first consider the argument that neither the Lübeck nor the Flensburg structures were in a port at all. It is suggested that, in contrast with a ship-repairing yard, a shipbuilding yard is not part of a port, and *Hunter* v. *Northern Insurance Marine* (13 App. Cas. 717 ; 14 R. 144) is relied on in support of this proposition. An examination of the case in the Court of Session (13 App. Cas. 717 ; 14R. 144) and in the House of Lords (13 App. Cas. 717 ; 14 R. 144) shows that the decision turned on the wording of the policy of insurance, the provisions of a local Act defining the limits of the Port of Greenock, and on the geography of the River Clyde. In my opinion that case affords no guidance in the present cases.

" On the contrary, I think that *The Three Motor Gunboats* ((1917) 7 Ll. P. C. 106) tells the other way. These gunboats were sought to be condemned as enemy property ; they were being constructed at Southampton to the order of the Turkish government and were seized as prize in the builders' works at Woolston in the port of Southampton in November, 1914. It was proved that at the time of the seizure the vessels were complete and had been tried and accepted by or on behalf of the Turkish government and that almost the whole of the purchase money had been paid. Sir Samuel Evans, P., inquired whether the seizure had occurred after his decision in *The Roumanian* ([1915] P. 26). His question was clearly directed to the point that *The Roumanian* ([1915] P. 26) was the earliest case in the first world war in which goods not actually on board or on the quayside had been condemned. So, when he was told that the gunboats had been seized before that judgment, he said that he assumed that they were already afloat, but was informed that they were still on the slips at the material date. Nevertheless, he condemned them.

" Moreover, the affidavits of the representative in Germany of the Ministry of Transport afford prima facie evidence that these structures were found in the ports of Lübeck and Flensburg, respectively, when they were occupied by the Allies. If this statement is challenged it is for the claimants to displace it ; but the affidavits in support of the claim contain no evidence that the stocks on which these structures were being built were not part of the respective ports. Accordingly, I find there is nothing in this point.

" It will be more convenient to consider the nature of the Lübeck and Flensburg structures in connexion with the question whether they are proper subjects of maritime prize. But I bear in mind that there is a close relation between this question and the third question, for, just as it is argued that the very nature of these structures is relevant to the question whether there was any intention to seize them at the material time, so the alleged absence of any such intention is relevant to the question whether they are, or are not, proper subjects of prize.

" This brings me to the cardinal issue on the present question, that is to say, whether the capture of a given object must be an act of conscious volition.

Case No. 222 *Contd.*

" In the forefront of the claimants' argument is put the fact that, until the formal amendments of the writs were made in the course of the hearing, the alleged seizure in prize of these objects was sworn to have taken place in 1947, and that there is no evidence whatever of any intention to effect their capture or seizure before that date. Indeed, it is suggested that it cannot be assumed that those advising the Crown realized, even in 1947, that it was then much too late to make prize seizures in Germany, but that this consideration first emerged, if not in the course of this hearing, at any rate in the course of the earlier proceedings to which allusion has already been made.

" Accordingly it is argued, as a matter of law, that there must either be or not be a seizure in prize at a given moment, and that it is a fallacy to suppose that there can be a formal seizure at a later date of things which are said to have been seized informally at an earlier date. But if there is any distinction between the actual capture and a formal seizure in prize, each, it is said, requires an act of conscious volition. The very fact that, even in 1948, those acting for the Crown thought (as is shown by the history of these cases) that the exercise of prize rights still subsisted after June 5, 1945, affords, if not conclusive, at least most cogent evidence that they were first consciously exercised in 1947.

" While it is recognized that in this court I ought to follow my own decision in *The Bellaman and The Agostino Bertani* ([1948] W. N. 370 ; 1 Ll. P. C. (2nd series) 265), that case is distinguished on the ground that the belated action taken in connexion with the ships in question was nevertheless in time, having regard to the express terms of the Italian Peace Treaty, whereas in the present cases it is suggested that all the available documents go to show that express instructions were given that there was to be no seizure until the actual completion of these objects as ships. It is submitted that there is no such doctrine as that the hostile capture by naval forces of a port necessarily involves the seizure in prize of everything in that port, or even of everything in that port which is a proper subject of prize. While it is admitted that a hostile capture of a port raises a prima facie presumption that ships found there are captured with the port itself (see *The Progress* ((1810) Edw. 210) it is argued that the presumption is rebuttable, and that the less a particular structure has acquired the character of a fully built ship by so much the more readily should the presumption be held to be rebutted.

" In arguing that capture in prize involves an act of conscious volition and that no such act took place until 1947, over two years too late, the claimants rely not only on the history of these cases exemplified by that of the *Hermes*, but on contemporary instructions given in 1945."

His Lordship then examined the evidence in detail, concluding that " this contemporary evidence plainly suggests, at the least, that there was no act of conscious volition to seize the objects in prize at any time before June 5, 1945, after which, if capture had not already been effected, it was too late ". He continued : " But behind all this lies the vital question whether every capture in prize necessarily involves an act of conscious volition at all. Manifestly this will usually be so as a matter of fact. For example, the capture of an individual ship on the high seas almost necessarily involves, as has already been seen, some overt act such as putting a prize crew on board, which imports that the capture was an act of conscious volition. But in my opinion the suggestion that an act of conscious volition is necessary either to prize capture or to prize salvage is in direct conflict with Sir William Scott's judgment in *The Progress* (Edw. 210).

" That case concerned a claim for salvage on ships recaptured from the French at Oporto by the allied British and Portuguese army under Lord Wellington. It is unnecessary for the purpose of these cases to consider the difficulties which Sir William Scott felt concerning the absence of any conjoint operation by the navy and army in the capture of Oporto, or as regards the limits, which must be set to the right of the military to claim prize salvage because their operations in a distant sphere led indirectly to the relief of all ports within the area of operations. Expressing his opinion generally, he said (Edw. 210) : ' I think I may consider it as decided in fact, that the French had captured these ships, and were actually in possession of them ; it is not necessary to shew that they had taken formal possession of each individual ship, because they had possession of the port itself ; and the taking of that which contained the vessels is in effect the same as taking bodily possession of the ships themselves. It is *likewise* '—(the italics are mine)—' clear in point of principle, that it is not necessary that it should be primarily the intention of the captor to recover the property. It might not be in his immediate contemplation, perhaps not even within his knowledge ; and yet, if the service is performed, if the recovery of the property is the immediate and necessary result of what he has done; he will be entitled to salvage.' The word ' likewise ' in the first line of p. 211 is, as I said in *The Bellaman* ([1948] W.N. 370 ; 1 Ll. P. C.), highly significant.

" Again, when the judgment was resumed at a later date, Sir William Scott said (Edw. 210, 213) : ' But I thought that, under all the circumstances, there was sufficient to satisfy the court that although in some instances no actual possession had been taken, yet that the ships had been sufficiently reduced under the bodily possession of the French army to entitle them to be considered as captors '. And after saying that the case still remained in some degree of obscurity, for there was no

Case No. 222 *Contd.* evidence as to the part which the navy took in the recapture, and that all the cases he could recollect were cases of joint service, while there was here no proof of co-operation, which was to be regretted, he said (*Ibid.* 214) : ' I do not see why the claim of the army may not be established on principle, if it can be shown that *maritime property in a maritime town* '—(the italics are mine)—' has been recovered by its efforts directed to that purpose '.

" When once the question of the capture of the ports upon surrender is determined, we are concerned with the alleged capture of maritime property in a maritime town, in spite of the fact that no formal possession was taken of any individual object, and without it being primarily the intention to capture any individual piece of property, the capture of which, I will assume, was not in immediate contemplation or even within the knowledge of those who captured the ports respectively. I have no doubt which way Sir William Scott would have decided this question of conscious volition. For what it is worth, founding myself on his judgment, I came to the same conclusion in *The Bellaman* ([1948] W.N. 370 ; 1 Ll. P. C. (2nd series) 265) ; but if this argument had convinced me that I was wrong I should not hesitate to say so.

" In *The Bellaman* ([1948] W. N. 370 ; 1 Ll. P. C. (2nd series) 265) when Tripoli was captured on January 23, 1943, it was reasonably clear that no particular attention was paid either to the *Bellaman* or the *Agostino Bertani* or to any other vessel lying sunk in the harbour. From this it was argued that seizure in prize was never contemplated at any rate until long afterwards, and that, in effect, the ships were only regarded as obstructions to the harbour to be cleared away as soon as possible. On September 3, 1943, an armistice was signed with Italy which admittedly precluded any seizure in prize so long as it continued. It was not until some time in 1944 that the Admiralty signal was sent directing that any such vessels as might be salved should be seized in prize and placed in the custody of the Admiralty Marshal's substitute. Although these instructions could not lead to a valid seizure, the time for which had passed by virtue of the terms of the armistice, I thought that they were not inconsistent with capture having already been effected. Then, in 1947, there was the same sort of performance of a purported seizure as in the present cases, which was manifestly dictated by the impending signature of a peace treaty with Italy.

" Likewise, as regards the Lübeck and Flensburg structures, I have little doubt that at the moment when these two ports were occupied no particular attention was paid to the question whether these structures were being captured in prize. The language of the Admiralty signal on June 8, 1945, is, as I have already said, ambiguous. Subject to this point there is a fairly close analogy between it and the signal quoted in *The Bellaman* ([1948] W.N. 370; 1 Ll. P. C. (2nd series) 265). Like that, it was out of date, but it shows an appreciation that ships in the occupied harbours were subjects of prize. Like that, it directs that seizure shall take place on some future event—in the one case when salvage operations are complete, in the other when the vessels are ready to depart for the United Kingdom. In the present cases, as in *The Bellaman* ([1948] W.N. 370; 1 Ll. P. C. (2nd series) 265), nothing more was done until these events happened, in each case in 1947, when the purported seizure in prize took place. In my opinion there is no essential distinction between the two cases. In each case there was no special intention to capture the particular objects, and no overt act of capture save in so far as that was involved in the capture of the port.

" In *The Ixion* ((1915) Not reported), decided on March 2, 1915, Sir Samuel Evans, P., with regard to mistaken notions about the date of capture and the habit of deponents, which appears meanwhile to have become inveterate, of swearing to the wrong date of capture, said something which touches this point. The case, so far as I am aware, is only reported in the official transcript. Here again it is important to bear in mind that his judgment in *The Roumanian* ([1915] P. 26) was under appeal to the Privy Council. It might still be open to doubt, therefore, whether, and in what circumstances, a cargo unladen and stored on land in this country was liable to capture.

" As to this, Sir Samuel Evans, P., said ([1915] P. 26): ' Then a question has been raised . . . as to whether the property was seized on land or on board ship or in port. Now what was done in this case apparently was what has been done by the officers of customs acting for the Crown in nearly all these cases of seizure of cargoes coming in after the outbreak of war. This vessel, the *Ixion*, arrived on October 2, and the hand of the captors is put upon these goods on October 3. It has become a habit of some of the deponents to say that the formal seizure was not made till afterwards. This is not in my view the proper construction to be put on what was done. What is done is this. " We seized these goods on October 3 " —applying the facts of this case to what is done—" but we will take no serious steps by way of removal of the goods or otherwise for some time until we see what the actual facts are." Then a little later on, I think in this case on October 17, further investigations having been made, the seizure which in fact took place *for all purposes of the law* '—(the italics are mine)—' on October 3 was completed on October 17 by their saying that " we shall adhere to the seizure which we made on October 3, having made investigation into the facts of the case ". It does not seem to me that there are any circumstances in this case at all which would tend to show that the seizure was on land, as

Case No. 222 *Contd.*

was contended with reference to part of the goods in the case of *The Roumanian* ([1915] P. 26), which came before me some months ago.'

" In *The Sommelsdijk* ((1925) 23 Ll.L.Rep. 119) the Court of Appeal considered the question whether a claim for damages for detention of a neutral vessel for forty-one days in exercise of the belligerent right of visit and search was a matter for the War Compensation Court or was in the exclusive jurisdiction of the prize court. The ship was detained in the Downs where she was searched, so far as was possible at sea, and was then ordered to London with an armed guard on board, and escorted by a destroyer. She was eventually taken to the Royal Albert Dock and was there thoroughly searched, her cargo being discharged for that purpose. The search being completed, the cargo was reloaded and she was allowed to proceed, without ship or cargo being brought into the prize court for adjudication. The court was unanimous in holding that the jurisdiction to award or refuse damages was in the prize court.

" Bankes, L.J., after quoting the commission issued at the beginning of the first world war, and, I may add, also issued in the recent war, said (*Ibid.* 121) : ' The question for decision in the present case is whether the modern practice of carrying out the right of visit and search constitutes a seizure within the meaning of the commission. In the absence of any authority to the contrary it would seem that the means adopted under the present practice of carrying out a visit and search would amply justify a finding of a seizure.' After quoting a passage from Oppenheim dealing with the question of the search of vessels, and referring to the fact that in *The Roumanian* ([1915] P. 26) Lord Parker, delivering the opinion of the Privy Council, held that the actual seizure took place when a letter from the Customs House stating that the cargo of petroleum was placed under detention was delivered on board the ship, at a time when only a comparatively small part of the cargo remained in the ship, the rest having been pumped into tanks some 100 to 150 yards from the wharf at which she lay, and not some weeks later when the writ was formally affixed to the tanks, Bankes, L.J., continued : ' The authorities appear to me to afford strong confirmation of the view that the action of the naval authority in the present case amounted to a seizure which clothed the prize court with authority to entertain the claim of the respondents to this appeal '.

" Atkin, L.J., said (23 Ll.L.Rep. 119, 123) : ' It may well be that a claim for injury to goods or to person made against a person exercising a belligerent right of search on the high seas, though neither vessels nor goods were ever brought in, might be held to be exclusively cognizable in the prize court. Good reasons could be adduced why it should. But assuming that there must be a capture as a condition precedent to jurisdiction in prize, it appears to me that the forcible bringing in of a vessel under an armed guard for purposes of search amounts to such a capture. If there were an immediate intention at the commencement of the operation to bring the vessel in for adjudication, there would be an obvious capture; and in my opinion it makes no difference that the present intention is to bring her in for search, with the further intention that if the search results in a particular way to have the vessel or goods adjudicated. It cannot be doubted that the practice of the prize court in this country has been to act on this view.'

" It is right, however, to say that a German Prize Court has held, on the construction of the German Prize Code, that it is necessary to determine in each case what was the intention of the commander of the warship in bringing the vessel into port, and if the vessel was only brought into port for the purpose of visit and search she could not be considered captured even if the commander of the warship had placed a crew on board: see *The Bertha Elizabeth*, (1915) Jurisprudence allemande en matière de prises maritimes, at p. 45, and *The Niobe*, at p. 50.

" In the present cases, however, as in *The Bellaman* ([1948] W.N. 370; 1 Ll. P. C. (2nd series) 265), it was not merely a question of visit and search and release, but, however belatedly, these objects have actually been brought in for adjudication. In my opinion I ought to follow my own decision in *The Bellaman* ([1948] W.N. 370; 1 Ll. P. C. (2nd series) 265) and hold that the hand of the captor was upon them from the moment when the ports respectively were occupied.

" (III) As to the third question, whether the Lübeck and Flensburg structures are proper subjects of prize, the rival arguments may be summarized as follows: the claimants submit that there are two distinct subject-matters of prize: ships on the one hand, and on the other merchandise which has a maritime character, either because it is part of a cargo at sea, or at least is in port about to be laden, or having been unladen is still in port, or, if removed elsewhere, is in such a situation as not to have lost its character as cargo. As regards ships, I am bound by my own decisions to hold that a ship is none the less a ship because it has for the time being become unnavigable, and I am glad to know that this accords with a decision of the Japanese Prize Court in the Russo-Japanese War: see *The Thalia* ((1904) 2 Russ. & Jap. P.C. 116), and of the Italian Prize Court in the first world war: see *The Beleno* ((1917) Not reported).

" But, while this is recognized, it is argued that a structure does not become a ship at all until it is either actually launched or at least has reached a stage of construction capable of being launched and floating. The claimants dispute that an embryo ship can be regarded as ' goods ' within the definition in the

Case No. 222 *Contd.*

Naval Prize Act, 1864, s. 2, whereby that term ' includes all such things as are by the courts of Admiralty and the law of nations the subject of adjudication as prize (other than ships)'. They assert that an object in course of construction as a ship either is or is not a ship, which term by the same section includes ' vessel and boat, with the tackle, furniture, and apparel of the ship, vessel or boat '. If it is merely in process of acquiring that character it has not become a ship, yet cannot be regarded as ' goods '.

" The Crown, on the other hand, points out first of all that neither of these definitions is expressed as being exhaustive ; that the Naval Prize Act, 1864, is an Act, for regulating procedure in prize, but not for declaring the law of prize ; that both definitions merely say that certain things are ' included ' in the terms ' ships ' and ' goods ' respectively ; and that neither definition excludes these structures : see *Mellows* v. *Low* ([1923] 1 K.B. 522, 526). But, even if they cannot be described as ' ships ', it is urged that they are such things as are by the courts of Admiralty and the law of nations the subject of adjudication in prize.

" I propose to begin with the assumption that these structures cannot be described as ' ships ' and that it is necessary to determine whether they are such things (other than ships) as ' are by the courts of Admiralty and the law of nations the subject of adjudication in prize '.

" In Story's Notes on the Principles and Practice of Prize Courts, at p. 28, the principles are thus stated : ' As preliminary to the subject it may be observed, that the ordinary prime jurisdiction of the Admiralty extends to all captures made on the sea, jure belli ; to captures in foreign ports and harbours ; to captures made on land by naval forces, and *upon surrenders to naval forces* '—(the italics are mine)—' either solely or by joint operations with land forces ; and this, whether the property so captured be goods, ships or mere choses in action ; to captures made in rivers, ports and harbours of the captors' own country ; to money received as a ransom or commutation on a capitulation to naval forces alone, or jointly with land forces '. Sir Samuel Evans, P., quoted this statement with approval in *The Frederick VIII* ([1917] P. 43, 45) in connexion with the above definition of ' goods '.

" The passage in Story is based in the main on the decision of Lord Mansfield in *Lindo* v. *Rodney*, reported in a footnote to *Le Caux* v. *Eden* ((1781) 2 Doug. 594, 613). It is worth noting in passing that, as appears from the end of the note, another action against Admiral Rodney in which the same question arose was tried by Lord Mansfield, in which he gave the same judgment without further argument, which was affirmed on appeal to the House of Lords. In effect, therefore, the judgment in *Lindo* v. *Rodney* ((1781) 2 Doug. 594, 613) itself has the authority of the Lords. The case arose on a rule to show cause why a prohibition should not be issued to the judge of the Admiralty from proceeding to the condemnation of goods taken and seized by His Majesty's land and sea forces under the command of Admiral Rodney and General Vaughan at the Island of St. Eustatius and its dependencies on the surrender thereof, as good and lawful prize.

" The circumstances of the surrender of the Island of St. Eustatius on February 3, 1781, are set out in the Annual Register for 1781, at p. 102. As the report of the case shows, various goods, wares, merchandise, arms, stores and ammunition were taken and seized on such surrender and all persons concerned were cited to show cause why they should not be pronounced to have belonged at the time of the capture and seizure to the King's enemies as goods of enemies, or otherwise liable to confiscation. The rule for the prohibition was discharged. The ground on which the prohibition was prayed was that the goods were taken on land, and Lord Mansfield said that the only question was whether the goods, being taken on land, though in consequence of surrender to ships at sea, excluded the only prize jurisdiction known in the kingdom. After an examination of the essential difference between the prize court and a common-law court, or even between the Admiralty Court when sitting in prize and when sitting in instance, and having expressly refrained from entering into any discussion as to plunder or booty in a mere continental land war without the presence or intervention of any ships or their crews, Lord Mansfield poses the question thus (2 Doug. 594, 614) : ' The question then is, whether such a capture ashore, by a fleet of ships and the land and the sea forces aboard, in consequence of a previous surrender of the place, is within the jurisdiction of the court of prize '. After noting (*Ibid.* 614a) that the prize court has uniformly without objection tried all captures in ports, havens, etc., within the Realm, he says : ' What is still more extensive, foreign ports or harbours are not the high seas, any more than the shore, but numberless captures made there have been condemned as prize '.

" I will not dwell upon the terms of the commission, which, as I have already mentioned, was issued during the late war as in former times ; but Lord Mansfield considers the reason of the thing ; he said (*Ibid.* 616) : ' Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a court for the trial of prize. Every country sues in these courts of the others, which are all governed by one and the same law, equally known to each. The claimant is not obliged to sue the captors for damages and undergo all the delay and vexation to which he may think himself liable, if he sues by a form of litigation, of which he is totally ignorant,

Case No. 222 *Contd.*

and subjects his property to the rules and authority of a municipal law by which he is not bound. In short, every reason which created a prize court as to things taken upon the high seas, holds equally when they are thus taken at land. The original cause of taking is here at sea. The force which terrified the place into a surrender was at sea. If they had resisted, the force to subdue would have been from the sea.'

" Later (*Ibid.* 619) Lord Mansfield referred to the judgment of Lee, C.J., in *Key & Hubbard* v. *Vincent Pearse* (*Ibid.* 606–608), in which he himself had been counsel : see *Le Caux* v. *Eden* (*Ibid.* 606–608).

" That case also arose out of an attempt to prohibit the Admiralty from taking jurisdiction to condemn a ship belonging to certain Irish merchants which had been taken, not upon the high seas, but, as was alleged, in the City of New York by a King's ship. On the ground, as Lord Mansfield summarized the judgment, that ' the question, prize or no prize, is the boundary line and not the locality of land or sea, or port within the body of a country within the realm ', Lee, C.J., decided in favour of the commander of the King's ship, and in the course of his judgment said (2 Doug. 607) : ' Though, therefore, I do agree that the jurisdiction of a Court of Admiralty, generally, is limited to matters arising super altum mare, and is, in that respect, local, yet I do not take it to be so in case of prize ; for the jurisdiction does not depend on the locality, but the nature of the question, which is such as is not to be tried by any rules of the common law, but by a more general law, which is the law of nations '. Finally, Lord Mansfield concluded (*Ibid.* 619) : ' If the question had been doubtful, arguments from utility and public convenience ought to have turned the scale. It could answer no good end, and must produce inextricable mischief, to captors, claimants, and the State, if goods taken upon land by ships, should not be within the prize jurisdiction.' In passing I would observe that there is nothing in the passages quoted to assist the claimants on the two earlier questions.

" But it is said : ' This is all very well in the eighteenth century, but we are engaged in considering prize law in the twentieth century '. There is no doubt, of course, that there has been a steady process of mitigation of the extreme rigour of prize law in modern times ; but I was reminded by the claimants in connexion with the question whether total surrender ends the right to seize in prize, that the object of prize is still the coercion of the enemy by harassing and interfering with his navigation. No doubt ; but let us see where that leads us.

" In *The Roumanian* ([1915] P. 26, 40), Sir Samuel Evans, P., cited with approval Dana's note to Wheaton (8th ed., 1866), p. 451, note 171, under the heading ' Distinction between Enemy's Property at Sea and on Land ', which note states :

'War is the exercise of force by bodies politic, for the purpose of coercion. Modern civilization has recognized certain modes of coercion as justifiable. Their exercise upon material interests is preferable to acts of force upon the person. Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile power has an interest in the property which is available to him for the purposes of war, that fact makes it prima facie a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea; for it is a subject of taxation, contribution and confiscation. The humanity and policy of modern times have abstained from the taking of private property, not liable to direct use in war, when on land.'

"The question whether the capture of any particular property is a justifiable means of coercion must in my opinion be tested as a matter of principle. For example, it must be irrelevant either that the object is so insignificant that by itself it makes no appreciable difference to the enemy's conduct of the war; or that the enemy is so nearly defeated that the seizure of one object more or less is in fact unnecessary inasmuch as it adds little or nothing to the coercion which is already being brought to bear on him; or that a proper subject of prize is in such a condition that it cannot be made serviceable in time to affect the enemy's powers to resist before the inevitable end occurs. Assuming these objects to be private property, can there be any doubt that they were of such a character and were so situated as to make their capture, in principle, a justifiable means of coercing the enemy? Can it be disputed that the enemy had an interest in these structures which were available to him for the purposes of war? And that he had such an interest because they were at least convertible property within his control or belonging to persons who were living under his control, whether it were on land or on sea, because he could make them the subject of a contribution or confiscation so as to be available for his war effort?

"The claimants' argument seems to lead to somewhat absurd results. For example, a ship damaged by collision on her maiden voyage is being repaired by fitting a number of fresh plates: her sister ship, building in the same yard, has the same number of plates yet to be fitted. One is 'maritime property' seizable in prize; the other is said not to be so. Consider also the plates themselves: in transit by sea from the steelworks to the port they would presumably be liable to seizure as contraband; so, I think, would they be when unladen on to the quay for delivery to the builder's yard. Yet when they are riveted into position they lose the character of

Case No. 222 *Contd.*

'maritime property' in the one case and keep it in the other. Indeed, I think that some guidance is to be obtained from the analogy of contraband cargo which is condemnable in spite of the Declaration of Paris, on the question whether, as Wheaton says, the convertibility of property to war-like uses is a test of the enemy's interest in the property so as to make it prima facie a subject of capture. It is the essence of contraband that the goods in question have an enemy destination and are capable of a war-like use, remembering that the words 'war-like use' have a wide significance in their application to a totalitarian State: see *The Alwaki* ([1940] P. 215) and *The Monte Contes* ([1944] A.C. 6).

"For example, parcels of floor polish and boot polish destined for Germany have been condemned as contraband on evidence that their chief component, beeswax, is extensively used as an ingredient of high explosive compositions and of waterproof compositions for sealing shells and bombs. The beeswax can be extracted by a simple chemical process; that is to say, the polish can readily be converted to war-like uses. But it is said that there is no analogy between such a case and the present, because cargo is in a separate category from ships. So it is in the sense that regarded merely as neutral cargo in an enemy bottom, or enemy property in a neutral bottom, the parcel of floor polish would be protected by the Declaration of Paris. It is the convertibility to war-like use that matters. The ships in Tripoli harbour were convertible to war-like use by salvage operations and a process of reconditioning. These structures are convertible to war-like use by the even simpler process of continuing the building upon lines already laid down. Save that in the case of the cargo it is also necessary to prove the enemy destination, either directly by the ship's documents or by the doctrine of a continuous voyage, while in the other two cases the enemy is in actual control at the moment of capture. I cannot see any intelligible distinction between these three classes of case.

"At the end of it all the question 'prize or no prize' seems to me to turn on the point from which one starts. If one starts by saying that good and lawful prize must be either a 'ship', in the full sense of the word, or 'goods', by which is meant cargo in a ship, or about to be laden in a ship, or just unladen from a ship, that is one thing. But if one goes to the fount of prize law to see whether the reason of it demands that there must be such a hard and fast rule, that is another. Beyond doubt the structures in question would have been held to be prize in Lord Mansfield's time.

"The claimants have not satisfied me that there is any ground in reason, or on authority, for holding that any one of them is not prize now. On the contrary, I hold that there was a hostile capture of the ports in which they lay; and that, being 'maritime property in a maritime town', they were captured bodily when the ports in which they lay were captured. I regard the procedural laxity and confusion as deplorable but not fatal. I am satisfied that every one of them is good and lawful prize, and I decree that they be condemned to the Crown accordingly. That being so, the other questions do not arise."

[Report: L.R. [1951] P. 347.]

ii.—Procedure

Prize Law—Vessel on Two Registers—Release of Vessel from Requisition for Sole Purpose of Seizing in Prize—Whether Vessel Condemnable by Reason of Flag Alone—Withholding of Evidence from Prize Court—Commercial Domicile—Neutral Owner with Involuntary Enemy Domicile—Whether Order of Condemnation can be Set Aside on Further Evidence. **Case No. 223**

The Inginer N. Vlassopol.

England, High Court of Justice (Admiralty Division, in Prize).
(Lord Merriman P.)

June 28, 1951.

The Facts.—This was a claim by Commander Spiridon Nicolaos Vlassopol, a Greek national born of Greek parents in Roumania, to have set aside the President's condemnation as prize, on July 10, 1942, of the steamship *Inginer N. Vlassopol*, and the restoration of the vessel to him as owner on the following grounds: (i) that the material facts relating to the ship's actual port of registration, her ownership and status, were not disclosed to his Lordship at the time when the decree of condemnation was made; (ii) that although the ship purported to be requisitioned by the Ministry of Shipping from January 3, 1941, until December 23, 1941, the conduct of the Crown during the material time involved actual acquisition by the Crown; (iii) that the seizure in prize of a neutral ship which had voluntarily come into a British port by the action of the owner, who was at all material times a citizen of an Allied country, and her purported release from requisition in order to be seized in prize, was contrary to the principles of law and equity.

The claimant had bought the vessel at Cardiff in 1932. He registered her in Roumania and she sailed under the Roumanian flag. After the outbreak of war between the United Kingdom and Germany in 1939, the claimant, who had strongly pro-Ally sympathies, cleared the vessel from Braila and ordered her to proceed to Avonmouth; she then came under the management of the claimant's cousin, who was a shipbroker in London. The

Case No. 223 *Contd.* claimant tried hard to get the vessel transferred to some other flag but was prevented by the obstruction of the Roumanian legation in London.

On January 3, 1941, the vessel was requisitioned by the British Ministry of Shipping under the Defence (General) Regulations, 1939. The claimant, who was still in Roumania, appears to have welcomed the news of the requisition. On February 15, 1941, Roumania was declared enemy territory for the purpose of the Trading with the Enemy Act. On the same day the vessel was registered by the Ministry as a British ship, and her name later changed to the *Hampton Lodge*. On December 6, 1941, Roumania declared war on the United Kingdom. Later in the same month the vessel was de-requisitioned, and on December 23 was seized in prize under her former name of *Inginer N. Vlassopol*. On July 10, 1942, she was condemned by Lord Merriman in proceedings which appeared to be undefended. On February 17, 1943, she was sunk.

In November 1946, the claimant escaped from Roumania and arrived in England on a Greek passport, and took steps to assert his rights. He applied successfully to the Custodian of Enemy Property for the release of his money in the United Kingdom. He also submitted a petition for the Bounty of the Crown in respect of the condemnation of the vessel and a claim to the Treasury for payment for the period of requisition. The Treasury rejected the claim on the ground that the time allowed for lodging a claim had expired. The Assistant Procurator-General rejected the claim on the ground that the claimant had been " a mobilized officer in the Roumanian Ministry of Marine ", and that he had sworn false statutory declarations. The claimant therefore sought to have the condemnation set aside in the present proceedings, this being the only remaining remedy which seemed to be open to him.

The President then discovered that various unsuccessful attempts had been made to enter an appearance on behalf of the plaintiff in the earlier proceedings and that the Swedish Legation, which was protecting Roumanian interests, had approached the Foreign Office, stating that the release of the vessel from requisition in order to have it seized in prize and so evade the obligations incurred in the requisition was an abuse and violation of the principles of international law.

The President now found as facts that the claimant was a Greek citizen, that he had never been a Roumanian citizen, that he had never been an officer of the Roumanian Ministry of Marine, that he had done everything possible to divest himself of his Roumanian connexions, and that though at material times he was personally present in Roumania he had tried to get an exit permit and failed and finally had escaped and come voluntarily to the United Kingdom. He found that the evidence put in by the Crown in the first proceedings could not be supported, and further, that the vessel had been taken off the British register for the sole purpose of seizing her as a Roumanian ship.

Held: that the decree of condemnation of the vessel must be set aside. Although there was prima facie evidence that the claimant had acquired a Roumanian domicile, he had shown that his continued residence there was compulsory and that he had taken all reasonable steps before the outbreak of war between the Allies and Roumania to indicate a pro-Ally attitude. In the circumstances, the temporary removal of the vessel from the British register did not raise a conclusive presumption that she was condemnable by reason of her flag alone.

Lord Merriman P. dealt in great detail with the evidence, expressing strong criticism of the actions and attitude of the Executive in this case, and finding the facts as summarized above. After referring to the declaration of war with Roumania, he continued : " These were the circumstances of which advantage was taken, by the process already described, to seize this ship in Prize on Dec. 23, 1941, on the ground that she was registered at Braila. But, assuming as I must that the original register remained unchanged because the intended transfer was never perfected, it was by the Crown's own act that she was registered only in Rumania at the date of seizure. She was on Lloyd's Register of British ships from Feb. 15 to Mar. 20, 1941, in her own name, and from Mar. 20, 1941, to Dec. 20, 1941, as the *Hampton Lodge*. That is to say, she was put on the British Register in her own name as a neutral under requisition on the very day that Rumania became a statutory enemy. She was taken off that Register for the sole purpose of seizing her as a Rumanian ship in that same name, and as soon as possible after the order for her requisition in Prize was made she was restored to Lloyd's Register in the British name which she had meanwhile been given. It was proved that it was the settled practice of the Crown to put foreign requisitioned ships on to the British Register. Be it so. That means that they are registered simultaneously in both countries and I will assume that this is possible.

" In the case of an order for requisition in Prize the convenience of the practice is apparent. The first duty of the captor is to swear an affidavit of ship's papers and to bring them as exhibits into Court where they remain pending adjudication. If a requisition order is made and the ship is placed on the British Register, one of two things must happen if she survives. In due course either she is condemned, in which case she becomes a British ship and her registry as such stands, or she is released to her owner, her papers are returned, and her British registry is then closed permanently. Beyond saying that this case shows the difficulties to which the adoption of

Case No. 223 *Contd.*

the practice may lead in connection with the requisition under the Defence Regulations of neutral ships which happen to be in this country, I intend to confine myself to the special circumstances of this case, which I trust are wholly exceptional. I am not unmindful of the great importance which, speaking generally, is attached to the flying of the enemy flag (see the *Unitas*, [1950] A.C. 536 ; 1 Ll. P. C. (2nd) 277). But their Lordships in that case recognized that there may be exceptions to its conclusiveness, although they thought it unnecessary to set exact bounds to the limitations of the doctrine. In this case the existence of the claimant's agents was known, since the notice of requisition had been sent to them. The slightest inquiry from them would have brought to light the claimant's Greek nationality, the circumstances in which the ship had been sent to this country, the efforts he had made to transfer her registry from Rumania and his anxiety to help in connection with the original requisition, all of which facts, as the letters show, were known to them. I must assume that no inquiries were made, otherwise the hugger-mugger with her registry would have been nothing less than an outrage. As it is, I decline to hold, in the circumstances as I now know them, that her temporary removal from Lloyd's Register raised a conclusive presumption that the ship was condemnable by reason of her flag alone.

" The whole case for the Crown is based on a misconception, natural and excusable enough at the time, but distorted out of all proportion by crass obstinacy. To uphold the infallibility of servants of the Crown is, no doubt, a laudable aim ; but it can be pursued too far if it involves charges of fraud and perjury made and persisted in to the last in spite of the poverty of the evidence on which they are based. In saying this I realize, of course, that the burden is not upon the Crown to prove these allegations, but remains throughout upon the claimant to justify his claim. But I cannot refrain from expressing my opinion that the claimant is a much ill-used man. If, to recur to a remark made by Mr. Adams [one of the Crown witnesses], he is still, in spite of this case, well disposed to this country, he is a singularly charitable man. But there remains the question whether he has established the right to have the decree of condemnation set aside.

" In my opinion, the law governing the matter is a great deal simpler than was made to appear in the argument on the part of the Crown. No doubt residence is a very important element in deciding whether, according to Prize law, a neutral has commercial domicil in an enemy country. No doubt, also, the fact of residence in an enemy country at the outbreak of war raises a presumption that the neutral was there *animo manendi*, which it lies on him to explain (The *Bernon*, (1798) 1 C. Rob. 102, at p. 104, per Sir William Scott). But these are not irrebuttable presumptions. In the *Kara Deniz*, 10 Ll. P. C. 355, Lord Sumner, delivering the opinion of the Board, made it plain that the questions whether the claimant had at the time of the capture and continuously thereafter a commercial domicil in Turkey and whether he had formed any intention, or taken any steps which had the effect of divesting him of that commerical domicil and adopting some other, were questions of fact and depended in the first instance upon the evidence as to the acts and intentions of the claimant (*Ibid.* p. 258).

" In the *Anglo-Mexican* [1918] A.C. 422 ; 5 Ll. P. C. 109, Sir Samuel Evans had released to an American partner in a German firm his one-fifth share in a cargo of cotton sweepings seized in the course of shipment in a British ship from America to Hamburg. This decision was reversed on appeal to the Privy Council. In the course of giving the opinion of the Board, Lord Parker said, at pp. 424 and 112 of the respective reports :

" ' The principles which ought to govern cases such as the present are not wholly free from doubt. It appears, however, reasonably certain that the question whether a particular individual ought to be regarded as an enemy or otherwise depends prima facie on his domicil, and domicil is, according to international law, a matter of inference from residence. Thus, if a neutral subject is at the commencement of or during the war to all appearance permanently resident in an enemy country, he will be regarded as an enemy. By taking up his permanent residence in a country other than that of his birth, he submits himself to and takes the benefit of the laws of that country, and in effect becomes one of its subjects. If, therefore, while this state of things continues goods belonging to him are seized as prize, such goods will prima facie be treated as enemy goods. But an acquired domicil may be abandoned, and if prior to the actual capture the owner has already done some unequivocal act indicating an abandonment of his acquired domicil in the country of the enemy, the goods will prima facie be treated as belonging to a neutral.'

" After mentioning without determining the point whether neutrals resident in a country which by the outbreak of hostilities becomes an enemy country ought to be allowed a reasonable time to elect whether they will abandon or retain their acquired domicil, Lord Parker continued (at pp. 425 and 113 respectively) :

" ' Again, it seems clear that a neutral wherever resident may, if he owns or is a partner in a house of business trading in or from an enemy country, be properly deemed an enemy in respect of his property or interest in such business. He acquires by virtue of the business a commercial domicil in the country in or from which the business is carried on, and this commercial domicil, though it does not affect his property generally, will affect the assets of the business house or his interest therein with

Case No. 223 *Contd.*

an enemy character. But a neutral having such a commercial domicil in a country which becomes an enemy country on the outbreak of hostilities ought, according to the views taken by British Prize Courts, to be allowed a reasonable interval during which he may discontinue or dissociate himself from the business in question. If he has done this prior to the capture at sea of any goods belonging to the business, such goods or his interest in them will not be confiscable.'

" It was conceded that the principles thus stated covered this case, as in my opinion they clearly do, but it was argued that they were *obiter dicta*. I do not think that this is so. Lord Parker was formulating principles within one branch or other of which the claimant must show that his case fell, or fail. In their Lordships' opinion he failed to bring himself within either branch. The statement of the principles to be applied was essential to the determination of the case and can only be said to be academic in the sense that the claimant failed to pass the test. But even if these passages could fairly be called *obiter dicta*, I should hesitate long before disregarding the considered opinion of a Board constituted as that was, even if I doubted its correctness. On the contrary, if I may respectfully say so, I have no doubt that it was plainly right.

" Applying these doctrines to the facts of this case, the claimant, although he had undoubtedly acquired a business domicil in Rumania before the outbreak of the World War by trading his ship from a Rumanian port and living in the country when he was not at sea, yet long before Rumania became involved in the war had done an unequivocal act indicating abandonment of his acquired domicil by sending his ship away and obtaining permission to change her registry in the circumstances already described, with the fullest intention of rejoining her outside the sphere of enemy influence. In these circumstances the fact that his intention was frustrated by *force majeure* does not in my opinion render the ship confiscable merely because of the compulsory continuation of residence. On the other hand, regarding him as having a commercial domicil in Rumania from the fact that he owned a business trading in or from that country, that is to say, his ship, he ought to be allowed a reasonable interval after the outbreak of war in which to discontinue or dissociate himself from the business in question. This also he had done, by the same process, not after but before there was any question of an outbreak of war with Rumania. For these reasons I think that this claim succeeds. The decree of condemnation will be set aside accordingly."

[Report : 1 Ll. P. C. (2nd) 307.]

INDEX

A

Abu Dhabi (Sheikh of), Concession Agreement with Petroleum Development (Trucial Coast) Ltd. (1939), 144–151, 158–160
Abyssinia. *See* Ethiopia
Acquiescence by foreign States, effect of, 100–102, 154
Actes de gestion/de pouvoir, 225–228
Aggression, war of, 592–595
Alien enemy—
  definition of, 578
  licence to sue, 509–512
  persona standi in judicio, 496–497, 509–512, 528, 584
  power of attorney given to, 521, 526–528
Aliens. *See also* Alien enemy; Enemy aliens
  admission of, 282–286
  allegiance of, 265–276
  detention of, 294–298, 310–314
  exclusion of, 297–299
  expulsion of, 300–315
  —executive discretion, 308–309, 314
  —grounds of, 301–302
  —judicial review, 314
  —procedure of, 310–315
  —prohibited immigrants, 309
  —"*refoulement*", 301
  —right of, 282–286
  extradition of. *See* Extradition
  jurisdiction over, 206–207
  position of, 286–287, 292–300
  —security for costs, liability to, 52–53
  privileged, 300
  prohibited immigrants, 303–308
  property rights of, 292–293
  right to sue, 289–290
  rights of, 286–287
  treatment of, 288–292
Allegiance, 265–276
Allied Control Council Law No. 10, 540, 541, 542
Allied High Commission Law No. 40...572–573
Allied Supreme Command, Agreement with Luxemburg (1944), 361–362
Alsace Lorraine, German annexation of (1940), 608–609
American States, International Conferences of (1889–1938), 441–442
Andorra, status of, 52–53
Annexation—
  belligerent occupation and, 608–609
  nationality and, 49–50, 80, 244–246, 258–262
  recognition of, 49–50, 61–64, 79–80, 261
  treaties, effect on, 399
Arbitration. *See also* Conciliation commissions
  competence to determine procedure, 470
Argentina—
  Law concerning expulsion of aliens (No. 4144), 315
  Low Countries, Treaty with (1893), 334
Armistice—
  military observers supervising, authority of, 469
  nature of, 318
  surrender and, 549, 706-707, 711
Asylum, 336–345
  Havana Convention on (1928), 350–354, 356, 357
  legation buildings, in, 349–357
  right of, 282–286, 309
Austria—
  Allied occupation of, 630–635, 694–700
  Anschluss with Germany (1938), 47–49
  —Inter-Allied Declaration concerning (1943), 245
  —nationality and, 244–246, 248–249
  Constitution (1929), 695
  Great Britain, termination of state of war with (1946), 245
  United States, Claims Settlement Agreement with (1947), 9

B

Base-line. *See* Maritime belt
Bays, 94, 111, 117–118, 164
Belgium—
  aliens legislation, 300, 314
  France, Treaty with (1874), 395

Belgium—*continued*
  German occupation of (1940), 683–684
  Luxemburg, Treaties with (1921), 396–397; (1931), 11–12
  Poland, Treaty with (1931), 340
  Sequestration of Enemy Property Law (1944), 529, 531
Belligerent forces, resistance movement as, 474
Belligerent occupation—
  administrative control, transfer of, 591
  administrative functions of Occupant and of municipal authorities, 630–631
  aggression, war of, and, 592–595
  annexation and, 608–609
  army of occupation, national law and, 591
  booty, 683–684, 696–697, 701
  civilian inhabitants, treatment of, 701
  —use of, against resistance, 677, 702–703
  commander-in-chief, authority of, 573–574
  court set up by Occupant, 608–609
  courts of Occupant—
  —nature of, 608–609
  —validity of judgments, 629–630, 638–640
  —whether foreign or municipal, 614–620
  crime by national of Occupant, 571
  crimes against occupying force, jurisdiction as to, 625–629
  crimes within army of occupation, 532–533
  criminal law, effect on, 318–324
  currency issued by Occupant, 576, 584, 585–590, 592–593, 599–604, 641–677
  currency legislation, 636–637
  currency of Occupant, 633–644
  delegation of powers to authorities of occupied State, 620–621
  duty of Occupant to inhabitants, 597–598
  effects of, 585–590
  enemy character and, 521–528, 530, 575–585, 703
  enemy territory and, 575–585
  extradition and, 318–324
  forced sale under, 635
  judicial powers of Occupant, 614–621, 629–630, 635

Belligerent occupation—*continued*
  legislation by—
  —Government-in-exile, 558–570
  —Occupant, 592, 605–607, 609–612, 633–634, 636, 641–677, 689–690
  liberation of territory, effect of, 590–591
  local laws under, 677
  meaning of, 595–596
  municipal legislation of Occupant, application in occupied territory, 444–445
  nature of, 235, 549–570, 590–591
  occupied State, liability of—
  —acts of Occupant, for, 612–614
  —payment of compensation, for, 14, 399
  occupied territory, whether a foreign country, 549–558
  offence committed by member of army of occupation, 234–235
  officials of occupied State, position of, 680
  police measures, 677
  private property—
  —respect for, 511–512, 646–660, 677, 678–686, 701
  —seizure of, 558–570, 701
  " protective custody ", 701–702
  public order, right of Occupant to legislate for, 689–690
  public property, rights of Occupant as to, 686–689, 690–692
  requisitions by Occupant, 621–625
  —bailment, and, 693–694
  —invalid requisition, 682–684
  —land, of, 612–613, 697–698
  —services, of, 679–680
  —subsequent sale, 699–700
  —transfer of property to third party, 694–697
  sequestration of—
  —bank assets, 642–667
  —enemy property, 681
  sovereignty and, 558–560
  Specialized Agency of United Nations in occupied territory, 444–446
  spoliation of occupied territory, 684–686
  status of members of occupation forces, 571–573
  status of occupied territory, 549–558
  trading with the enemy and, 578–581, 703
  treaties, effect on, 574–575

Belligerent rights—
  surrender and, 549
  termination of war and, 711–712
Berne, Copyright Convention and Union, Austria and, 47–48
Bogotá, Charter of Organization of American States, 63, 441–443
Booty, 683–684, 696–697, 701
Brazil, Treaty with Italy (1931), 339
Bremen—
  status of, 500–501
  United States, Treaty with (1827), 500–501, 504
Brioni, Agreement of (1942), 3
British Commonwealth of Nations, independent members of, 50
British Protected States, status of, 54–55
Brussels Conference (1948), 48
Burma, Japanese occupation of, 575–585, 641–642
Bustamante Code of Private International Law (1928), 316, 382

C

Canada, Citizenship Act (1946), 293
Capture. *See* Prize law
Charter of the United Nations—
  Art. 2 (7) (domestic jurisdiction), 450
  Art. 96 (Advisory Opinions), 367
  Arts. 104 (legal capacity) and 105 (immunities), 448
  Chaps. IX and X (Arts. 55–72) (Economic and Social Council), 449
Co-belligerency, 426, 473
Codification Committee of League of Nations, 379
  Report on Territorial Waters (1927), 116, 380
Codification Conference (The Hague, 1930), 91, 92, 116, 133
Colombia, Protocol of Friendship with Peru (1934), 349
Comity, 8–9, 14–16
  reciprocity and, 14–16
Commercial Bureau of the American Republics, 441–442
Companies. *See* Corporations
Concessionary agreements, 161–164
  treaties, as, 313
Conciliation commissions—
  binding force of decisions, 472
  individual interests and, 472
  nature of proceedings before, 472
  ouster of municipal courts by, 394–395
Conciliation commissions—*continued*
  parallel proceedings in municipal courts, 471
  presentation of claims to, 427–429
  supremacy over municipal courts, 471
  supremacy over prior judgment of municipal court, 404–405, 439
Conclusiveness of statements of Executive, 23
  as to communications with an occupied State, 492
  —non-recognition of annexation, 63
  —status of diplomatic envoy, 58–59
  —status of foreign State, 211–214
Confiscatory legislation, 24–38, 40, 61–64, 171–189, 197–206, 558–570
Consuls—
  certification of will by, 359
  functions of, 358–359
  immunities of, 359–360
  service of writ by, 358–359
Continental Shelf, 144–164
  doctrine of, 152–158
  limit of, 154–155
  proclamations, 152–154
  State territory, as part of, 161–164
  subsoil of waters, 156–157, 161–164
Contraband, 724
Contract between Government and individual, 545–546
Contracts—
  invalidation by Peace Treaty, 403
  proper law, 149–150
  war, effect of, on, 509, 521–528
Contra proferentem rule, 150, 429
Copyright—
  enemy property, as, 24–36
  international infringement of, 47–49
Corporations—
  enemy character of, 530, 642, 650
  enemy, property of, 529
  enemy-controlled, 516–520, 529
  enemy-owned, 185–188
  foreign, jurisdiction to wind up, 189–194
  nationality of, 280–281
Counterfeiting Currency, Convention on Suppression of (1929), 382

Customs Formalities, Convention on Simplification of (1923), 382
Czechoslovakia—
  citizenship of, 250–251, 257
  France, Treaty with (1928), 340
  Germany, Treaty with (1938), 250, 251, 257
  Sudeten Germans and, 249–251, 257–258
  Sudetenland, cession of, 84

D

Danube-Save-Adriatic Railway Co., 1–3
Danzig—
  Constitution, 261
  German annexation of, 64, 258–262
Declaration of Death of Missing Persons, Convention on (1950), 381
Demilitarized zones, 164–170
  nature of, 169
Denationalization, right of, 258–259
Diplomatic envoys—
  ambassador—
  —assistance to, by municipal courts, 57–60
  —recognition of, 58–59
  family of, 348
  immunity from jurisdiction, 347–348
  official residence of, asylum in, 349–357
  statement of Executive as to, 58–59
Domicile, commercial, 727

E

Economic and Social Council, functions of, 449–450
Economic Statistics, Convention on (1926), 382
Enemy aliens—
  change of sovereignty and, 244–246
  inheritance rights and, 499–508
  rights of, 291–292
  security for costs, and, 289–290
Enemy character—
  belligerent occupation and, 521–528, 530, 703
  control, test of, 531
  copyright owner, of, 530
  corporations, 530, 642, 650
  goods, 551
  individuals, 521–530
  loss of, 24–36
Enemy character—*continued*
  property, 254–255
  residence, test of, 521–525
  ships, 530
Enemy property, 513–516, 520. *See also* Trading with the enemy
  copyright, 24–36
  meaning of, 185–188
  ownership of appropriating State, nature of, 515–516
Enemy subjects, effect of war on, 509–516
Enemy territory, belligerent occupation and, 575–585
Ethiopia, Agreement with Great Britain (1944), 282, 283, 285
Europe, Council of, Convention for Protection of Human Rights and Fundamental Freedoms (1950), 342, 381
Executive, statement of. *See* Conclusiveness of statement of Executive
Expatriation, 267–270. *See also* Nationality, loss of
Expressio unius est exclusio alterius, 150–151
Extradition, 315–346
  amnesty and, 330–331
  belligerent occupation and, 318–324
  conditions of, 318–334
  conviction as basis for request, 325–330
  crime committed outside jurisdiction of requesting State, 318–324
  double criminality, 325–330
  general principles of international law and, 315–317, 336–345
  national of State of asylum, 324–333
  political crimes, 325–330, 336–346
  prior expulsion and, 325–330
  procedure of, 335
  speciality, principle of, 331
  State succession and, 78, 332–333
  treaties of, 395
  treaty of, absence of, 315–318, 333, 334, 336–348
  war criminals, of, 331
Extra-territorial effect of legislation, 195–206

F

Fisheries zone. *See* Maritime belt
Foreign sovereign, defamation of, 23

Foreign States—
  exemption from execution, 3–9
  exemption from jurisdiction, 3–9
  —indirect impleading, 219–221
  —real party in interest, 228–232
  —set-off, 219–221
  —State-owned property, 221–223, 228–232
  —waiver of, 214–216, 218–219, 223–224
France—
  Belgium, Treaty with (1874), 395
  Constitution (1946), 52, 394, 395, 435
  Czechoslovakia, Treaty with (1928), 340
  Extradition Law (1927), 324, 344
  German occupation of (1940), 678
  Great Britain, Treaties with (1882), 401–402, 435 ; (1939), 117, 118
  Inter-Allied Supreme Command, Agreement with (1944), 400
  Italy, Treaties with (1870), 324, 327, 328 ; (1896), 508 ; (1930), 290
  Landlord and Tenant Law (1948), 434–435
  Latvia, Treaty with (1937), 288, 289
  nationality legislation, 51, 247, 507, 508
  Saar, Treaty with (1948), 431, 432
  Sardinia, Treaty with (1760), 290
  Spain, Treaty with (1862), 280, 360, 435
  Switzerland, Treaty with (1869), 393, 394
Frankfurt, Treaty of (1871), 400–401

G

General Assembly of the United Nations—
  Advisory Opinion of International Court of Justice and, 470
  legislative function of, 389–390
  Resolutions on—
  —Eritrea (1949), 389
  —Genocide (1946), 370
  —International Court of Justice (1947), 388
  —Palestine (1947), 164, 166
  Secretariat, Staff Rules, 453
Geneva Conventions—
  municipal law and, 12–13
  Prisoners of War (1929), 12–13, 275, 544, 607 ; (1949), 12–13
Genocide, Convention on Prevention and Punishment of (1948)—
  history of, 370, 375, 383–384
  object of, 368–371
  reservations to, 364–392
German Federal Republic—
  Constitution (Basic Law) (1950), 41, 44–45, 46, 68, 198, 575, 621
Germany—
  Allied Declaration of Supreme Authority Over (1945), 573
  Allied occupation of, 234–235, 571–574, 614–621
  Alsace Lorraine, annexation of (1940), 608–609
  Anschluss with Austria (1938), 47–49
  —Inter-Allied Declaration concerning (Moscow, 1943), 245
  —nationality and, 244–246, 248–249
  Czechoslovakia, Treaty with (1938), 250, 251, 257
  Danzig, annexation of, 64, 258–262
  Extradition Law (1929), 248, 330, 340
  occupation of—
  —Belgium, 683–684
  —France, 678
  —Greece, 629–630
  —Luxemburg, 633–634
  —Netherlands, 473, 536–538, 558–570, 609–614, 679–682, 701–702
  —Norway, 635, 684–686
  Reich and Federal Republic, 40–42, 44–47, 68
  Saar Territory and, 42–44
  Spain, Treaty with (1878), 341
  status of, after 1945...43
  surrender of (1945), 549, 706–707
  —Declaration of (Berlin, 1945), 706–707, 712, 714
  Trading with the Enemy Act (1940), 650
  Turkey, Treaty with (1930), 339
  United States, Treaties with (1921), 503, 505 ; (1923), 504
  Upper Silesia and, 49, 67–69
Government-in-exile, legislation of, 558–570
Great Britain—
  aliens legislation, 283, 285, 310–313
  Allied Forces Act (1940), 182
  Austria, termination of state of war with (1946), 245
  British North America Act (1867), 286

Great Britain—*continued*
  Continental Shelf Proclamations (1948, 1949 and 1950), 153
  Crown Proceedings Act (1947), 212
  Distribution of German Enemy Property Act (1949), 188
  Ethiopia, Agreement with (1944), 282, 283, 285
  Extradition Acts, 209, 338, 341
  France, Treaties with (1839), 117, 118; (1882), 401–402, 435
  Indian Independence Act (1947), 18, 208
  Ireland Act (1949), 344
  Irish Free State (Consequential Provisions) Act (1922), 344
  Israel, Governmental Agreement with (1950), 398
  Manual of Military Law, 588
  Naval Prize Act (1864), 720
  Netherlands, Agreement with (1944), 172, 173
  Republic of Ireland Act (1948), 344
  trading with the enemy legislation, 26, 29, 30, 32, 36, 171, 172, 174, 176, 177, 184, 185, 186, 189, 511, 579, 646, 650, 726
  United States, Treaties with (1818), 111; (1931), 339
  Venezuela, Treaty with (1942), 152
Greece, German occupation of (1941), 629–630

H

Hague Codification Conference (1930), 91, 92, 116, 133
Hague Convention on Civil Procedure (1905), 20–22, 434, 574–575
Hague Conventions concerning Police and Fisheries in the North Sea (1882), 101, 116, 117, 127, 128
Hague Conventions of 1899:
  No. II (Laws and Customs of War on Land), 690, 691
Hague Conventions of 1907:
  No. I (Pacific Settlement), 599
  No. III (Opening of Hostilities), 599
  No. IV (Laws and Customs of War on Land), 532, 633–634
  —general participation clause, 678–679
  —preamble, 556
Hague Regulations (1899 and 1907), municipal law and, 13–14, 621–625
Hague Regulations (1899), 626, 629
  Art. 43...83
  Art. 52...692
Hague Regulations (1907), 532, 567, 602, 626, 661, 692, 701
  Art. 3 (constitution of armed forces), 624
  Arts. 4 and 7 (treatment of prisoners of war), 607
  Art. 36 (armistice), 318
  Arts. 42–56 (military authority over occupied territory), 596
  Art. 43 (respect for laws of occupied territory), 83, 554, 555, 556, 561, 567, 568, 569, 588, 596, 600, 602, 630, 635, 668, 673
  Art. 46 (private property), 562, 564, 569, 643, 644, 646, 647, 652, 653, 660, 673, 700, 706
  Art. 47 (pillage), 644, 660
  Art. 48 (collection of taxes), 588
  Art. 51 (contributions), 653
  Art. 52 (requisitions), 622, 623, 679, 680, 682, 693
  Art. 53 (private property), 644, 660, 683, 686–688, 690–692, 695, 696, 700
Harvard Research Draft Convention on Law of Treaties, 380
Havana Conventions of 1928:
  Asylum, on, 350–354, 356, 357
  Private International Law, on, 316, 382
High seas, fishing rights over, 156
Hong Kong, Japanese occupation of (1941), 521–529, 636–637
Hostilities, termination of, 545–546
Human rights, 236–243
  Convention for Protection of Human Rights and Fundamental Freedoms (1950), 342, 381
  freedom of conscience under Mandate, 237–243
  Universal Declaration of (1948), 259, 342
Humanity, crimes against, 538–544
  nature of, 541
Hungary, Peace Treaty with (1947), 3, 172–174, 183

I

Immigrants, prohibited, onus of proof as to, 303–308

India—
  Constitution (1947), 18–19, 209
  Instrument of Accession (1947), 17–20
  partition of, 207
  States of, position of, 17–20, 69–72, 332–333
Individual in international law, 236–346, 698–699. *See also* Aliens; Enemy character; Extradition; Human rights; Nationality; Naturalization
  inter-governmental agreement, claims under, 9–10
  international tribunals, before, 244
  treaties—
  —preparatory work, and right to invoke, 429–430
  —rights under, 399
Indonesia, Republic of United States of—
  former colony of Indonesia and, 223–224
  Union Statute as a treaty, 433–434
Institute of International Law—
  Draft Convention on Extradition (1880), 341
  Draft Rules on the Territorial Sea (1928), 109
Inter-Allied Declaration against Acts Committed in Territories under Enemy Occupation and Control (1943), 660, 661, 663, 675
Inter-Allied Reparations Agreement (1946), 516
Inter-Allied Supreme Command, Agreement with France (1944), 400
International comity, 8–9, 14–16
  reciprocity and, 14–16
International Court of Justice—
  Advisory Opinions—
  —competence to render, 366
  —competence to request, 366–367
  —General Assembly and, 470
  execution of judgments, 470
  functions of, 105–106
  general principles of international law, 106–107
  intervention procedure, 470
  Permanent Court of International Justice and, 106
  Rules of, Art. 66...356, 357
  Statute of—
  —Art. 36...86
  —Art. 38...106
International Court of Justice—*continued*
  Statute of—*continued*
  —Art. 57...365
  —Art. 63...356
  —Art. 65...366
  —Art. 68...365, 366
International Institute of Intellectual Co-operation, 458–465
  Staff Regulations, 459, 461
International Labour Organization—
  Administrative Tribunal, competence of, 457, 460
  Staff Regulations, 465–466
International law—
  comity and, 15–16
  customary, 1, 691
  general principles of, 12–13, 106–107, 315–317, 336–345
  municipal decisions as evidence of, 1
  municipal law and, 3–14, 475–477 595, 688
  municipal legislation contrary to, 10–11
  "new international law", 388–389
  principles of, 106–107
  sources of, 1
  subjects of, 1–3
International Law Commission, Reports on—
  Continental Shelf, 156, 157
  High Seas, 158
International Military Tribunal at Nuremberg, Charter of, Art. 6 (*b*), 539, 540, 541, 542
International officials—
  contracts of employment, 450–469
  —frustration of, 463–465
  —probation period, 465–466, 468–469
  —renewal of, 454–456
  —termination of, 450–451, 452–454, 465–469
  dismissal of, 460–463
  pensions fund and, 456–457, 467–468
  salary *en disponibilité*, 458–460
International organization and administration, 441–469
  continuity of organizations, 441–443
  international officials, 450–469
  military observers supervising armistice agreement, 469
  specialized agencies of the United Nations, 444–446
  succession to rights, 441–443

International Refugee Organization—
  Agreement with Commander-in-Chief, Eucom (1948), 444–446, 572
  Constitution, 380, 445, 447
  legal personality of, 447–449
  status of, 572
  —immunities and privileges, 444–446
International tribunals, individuals and, 244
Irish Free State—
  Aliens Act (1935), 342
  Constitution (1937), 336, 337
Israel. *See also* Mandated territory
  Declaration of Independence (1948), 166
  Defence Service Law, 11
  demilitarized zones of, 164–170
  Great Britain, Governmental Agreement with (1950), 398
  Law of Administration Ordinance (1948), 65, 66, 73, 75, 76
  Nationality Law (1951), 56
  Nazi and Nazi Collaborators (Punishment) Law (1950), 538–540, 542, 543
  succession to proceedings commenced by Palestinian Government, 72–77
  succession to rights of Palestinian Government, 64–67
  Syria, General Armistice Agreement with (1949), 164, 167, 168
  territory of State of, 10–11
  war criminals, treatment of, 538–544
Italy—
  Allied occupation of, 625–629, 686–690
  Armistice with (1943), 716
  Articles of War, 622–624, 626, 627, 628, 688, 690–691
  Brazil, Treaty with (1931), 339
  co-belligerent, as, 426
  Constitution, 82, 622
  France, Treaties with (1870), 324, 327, 328; (1896), 508; (1930), 290
  German occupation of (1943), 690–694
  Peace Treaty of Paris (1947), 3, 77–82, 290, 319–320, 323, 389, 394–395, 406–428 *passim*, 436–439, 471, 714
  Penal Military Code of War, 346
  Switzerland, Extradition Treaty with, 345
Italy—*continued*
  Trading with the Enemy Act (1938), 650
  United States, Treaty with (1868), 320
  Yugoslavia, occupation of, 621–625

J

Japan—
  Civil Affairs Manual, 652
  occupation of—
  —Burma, 575–585, 641–642
  —Hong Kong, 521–529, 636–637
  —Malaya, 585–590, 638–640
  —Philippines, 590–607, 642–677, 702–703
  Peace Treaty with (1951), 494
  surrender of (1945), 494
  Trading with the Enemy Act, 650, 652
Jews—
  crimes against the Jewish people, 538–544
  German confiscation of property of, 24–36, 558–570
Jurisdiction—
  aliens, over, 206–207
  crimes against occupying force, 625–629
  crimes committed abroad, in respect of, 206–210, 234–235
  crimes committed by aliens, in respect of, 532–533
  demilitarized zones, over, 164–170
  exemption from jurisdiction—
  —consuls, 359–360
  —diplomatic envoys, 347–348
  —foreign States, 3–9, 210–232
  — —officers of, 232–234
  —international organizations, 444–449
  —State agencies, 225–228
  extra-territorial effect of, 197–206
  foreign companies winding up, 189–194
  —assets of, jurisdiction over, 189–194
  ouster by conciliation commission, 394–395
  personal, 234–235
  property situate abroad, over, 210
  property within territory, over, 558–570
  State succession and, 77–78
  territorial, 171–234
  —exemption from, 210–234
  —limits of, 171–189

L

Latvia—
  annexation by U.S.S.R., 49–50, 61–64, 251, 288–289
  France, Treaty with (1937), 288, 289
  United States, Treaty of Friendship, etc., with, 63
Laws of war, enforcement of, 678–679
League of Nations—
  Council, Report on reservations to treaties, 372
  reservations and, 379–380
  Staff Pensions Fund, 456–457, 467–468
Lex rei sitae, 393
Lex situs, 171, 175
Libya, status of, 77–78
Lithuania, annexation by U.S.S.R., 79–80
London, Agreement of (1945). *See* International Military Tribunal at Nuremberg, Charter of
Luxemburg—
  Allied Supreme Command, Agreement with (1944), 361–362
  Belgium, Treaties with (1921), 396–397; (1931), 11–12
  Constitution, 13, 362
  German occupation of, 633–634

M

Magna Carta, 156
Malaya, Japanese occupation of, 585–590, 638–640
Mandated territory—
  human rights in, 236–243
  nationality of inhabitants, 55–56
Mannheim, Revised Convention of (1868), 85
Mare clausum/mare liberum, 132
Maritime belt, 86–144, 160
  acquiescence by foreign States, 100–102
  base-line, 92–95, 111–113, 115–121, 133–136
  —bays, 94, 111, 117–118
  —headland theory, 135–136
  —straight-line system, 96–100, 102–105, 119–121, 133, 135, 143
  —ten-mile rule, 93–95, 142–143
  historic title, 104–105, 111, 124–127
  international character of delimitation of, 95–96, 115, 137
  measurement of, 86–144
  nature of, 86
  nature of the coast, 89–92, 104, 111, 117, 121–122
  nature of rights over, 95, 115
Maritime belt—*continued*
  three-mile limit, 132, 136
Marriage, polygamous, 286, 294–298
Merger of sovereign State within Union, 69–72
Mexico—
  alienage and naturalization legislation, 280
  Constitution, 309
Mobilia sequuntur personam, 174
Montevideo Treaty on International Penal Law (1940), 333
Montreux Convention (1937), 429
Morocco, status of, 51
Moscow, Declaration on German annexation of Austria (1943), 245
Munich Agreement between Germany, Italy, Great Britain and France (1938), 249, 250, 257
Municipal law—
  international law and, 3–14, 475–477, 595, 688
  treaties and, 11–14, 393–395

N

Nationality. *See also* Naturalization
  acquisition of, 51, 244–251
  —compulsory, 247–248
  annexation and, 80, 244–246, 258–262
  cession and, 249–251, 257–258
  change of sovereignty, effect of, 49–50, 244–246, 257–262, 400
  children, of, 278
  corporations, of, 280–281
  dual, 251–254, 265–278
  enemy, acquisition of, 263–264
  enemy character and, 244–246
  extradition and, 324
  loss of, 251–265, 280
  —proof of, 262–264
  mandated territory, in, 55–56
  married women, of, 249, 276–277, 278–281
  military service and, 246–247
  proof of, 244, 262–264
  war, effect of, on, 265, 507–508
Nationalization decrees, 179
  extra-territorial effect of, 38–39
Nationals, meaning of, 20–22
Naturalization, 254–256
Netherlands—
  Currency Decree (1945), 206
  Enemy Property Decree (1944), 250, 255, 256, 257, 258–259, 515–516
  German occupation of (1940), 473, 536–538, 558–570, 609–614, 679-682, 701–702

Netherlands—*continued*
  Government-in-exile, legislation of, 172–174, 558–570
  Great Britain, Agreement with (1944), 172, 173
  Indonesia—
  —transfer of sovereignty to, 224
  —Union Statute between (1949), 434
  Nationality Law (1892), 244, 277, 279
  —Emergency Decrees (1943), 254, 256, 277 ; (1945), 278
  occupation measures, legislation concerning, 262, 609–611, 681
  Trading with the Enemy Decree (1940), 172–175, 177, 180, 650
Neutral subjects, enemy-controlled corporations and, 516–520, 529
North Sea Fisheries and Police Conventions (1882), 101, 116, 117, 127, 128
Norway—
  Constitution (1814), 635
  Enemy Property Law (1946), 263
  German occupation of (1940), 635, 684–686
  Nationality Laws (1924 and 1946), 263
  Territorial Waters Boundary Commissions (1911 and 1912), 97, 102, 138, 142

O

Okinawa, status of, 549–558
Opium and Drugs Convention (1925), 379
Organization of American States—
  Charter of, 63
  Pan-American Union and, 441–443
  Union of American Republics, and, 441–443

P

Pacific Settlement of International Disputes, General Act for the (1928), 381, 383
Pakistan, status of, 50, 210–214
Palestine (*see also* Israel)—
  Mandate for, 237
  nationality of inhabitants of, 56
Pan-American Extradition Convention (1933), 316
Pan-American Union, 441–443
  Organization of American States, and, 441–443
Paris, Peace Conference of (1947), 420–422
  Peace Treaties of (1947). *See* Peace Treaty, etc.
Passports, 53
Peace Treaty with Hungary (1947), 3, 172–174, 183
Peace Treaty with Italy (1947), 3, 77–82, 290, 319–320, 323, 389, 394–395, 406–413, 414–423, 424–428, 436–439, 471, 714
Peace Treaty with Japan (1951), 494
Permanent Court of International Justice—
  International Court of Justice and, 106
  Judgments of, authority before municipal court, 3–9
Persian Gulf, Continental Shelf under, 154
Peru, Protocol of Friendship with Colombia (1934), 349
Philippines, Japanese occupation of, 592–607, 642–677, 702–703
Poland, Extradition Treaty with Belgium (1931), 340
Postliminium, 638–640
Potsdam Agreement (1945), 259, 261
Prisoners of war. *See also* under Geneva Conventions
  mistreatment of, 544
  pay of, 544
  war crimes concerning, 533–535
  war criminals as, 544
Prize law—
  capture, meaning of, 704, 706
  contraband, 724
  domicile, commercial, 727
  ports, capture of, 705–706, 710–713
  prize or no prize, 722–725
  release from requisition for purpose of seizure, 725
  residence, 728–730
  setting aside condemnation, 727–730
  subject of, 713–714, 719
  volition, need for, 713
Proper law of contract, 149–150
Protectorates, 51–55
Prussia, Treaty with United States (1828), 500, 503, 504, 505

Q

Qatar—
  Concession Agreement with Anglo-Persian Oil Co. (1935), 161–164

Qatar—*continued*
  Continental Shelf Proclamation (1949), 163

R

Recognition—
  acts of foreign Governments, of, 24–40, 61–64, 558–570
  annexation, of, 49–50, 61–64, 79–80, 261
  de facto/de jure, 595
  Governments, of, 57–60
  new States, of, 39–40
  States, of—
  —necessity for, 17–20, 57
  —state of war, and, 244–246
Requisitioning. *See also* under Belligerent occupation
  compensation for, 697–699
  land, of, 612–613
  puppet Government on behalf of Occupant, by, 629
  restoration of requisitioned property, 423–426
Rhine, River, navigation on, 84–85
Rivers, international, 84–85
Road Signs and Signals, Protocol and Final Act (1949), 382
Road Traffic Conventions (1926), 235; (1949), 382
Rome, Agreements of (1923), 1, 2, 3
Round Table Conference (Netherlands-Indonesia) (1949), 434
Russia. *See* Union of Soviet Socialist Republics

S

Saar Territory—
  France, Treaty with (1948), 431, 432
  status of, 42–44
St.-Germain, Treaty of (1919), Rome Agreements under (1923), 1, 2
San Francisco, Peace Treaty of (1951), 494
Sanitary Convention for Aerial Navigation (1933), 382
Sardinia, Treaty with France (1760), 290
Saudi Arabia, Continental Shelf Proclamation (1949), 153, 154
Sea warfare, surrender, 707–709. *See also* Prize
Sea-bed, 151–152, 155
Slavery Convention (1926), 378
South Africa, Union of, Immigration Act (1937), 295–296, 303–308
Sovereigns, dignity of, 23
Sovereignty—
  belligerent occupation and, 558–560
  nature of, 7–8, 79
Spain—
  France, Treaty with (1862), 280, 360, 435
  Germany, Treaty with (1878), 341
State-owned foreign company, nature of, 20–22
State succession, 64–78
  contractual obligations, to, 40–42, 44–45
  extradition and, 78, 332–333
  judgments of courts, and, 69–72, 78
  jurisdiction of courts and, 77–78
  obligations, succession to, 45–47, 67–69
  pending litigation, 72–77
  rights, succession to, 64–67
  set-off of claims, 40–42
State territory, 79–170
  acquisition of, 79–80
  Continental Shelf and, 161–164
  demilitarized zones, 164–170
  loss of, 81–84
  rivers, 84–85
States—
  beginning of existence of, 17–20
  continuity of, 40–49
  extinction of, 49–50
  recognition of, 17–20, 244–246
  sovereignty and independence of, 20–23
Statutes of limitation, effect of war on, 474, 477–492
Sudeten Germans, nationality of, 250–251, 257–258
Sweden, Extradition Law (1913), 340
Switzerland—
  Constitution, 293
  Extradition Law (1892), 341, 345
  France, Treaty with (1869), 393, 394
  Italy, Extradition Treaty with, 345
Syria, General Armistice Agreement with Israel (1949), 164, 167, 168

T

Tariffs and Tradė, General Agreement on (1949), 380
Territorial sea, legal principles as to, 108–110

Territorial waters, 86–144. *See also* Maritime belt
  Continental Shelf, 144–164
  nature of, 150–152
  subsoil of, 151–152, 156–157
Terrorism, Convention for Prevention and Punishment of (1937), 382–383
Trading with the enemy—
  belligerent occupation and, 578–581, 703
  copyright and, 24–36
  permitted transactions, 496–498
  prohibition of, 581–584, 649–652
  sale agreement, validation of, 520
  shareholders in company, status of, 520
  vesting of securities outside country, 513–515
Treason, change of nationality and, 265–276
Treaties, 361–440
  annexation, effect of, 399
  belligerent occupation, effect of, 574–575
  bilingual, 408, 429–430
  concessionary agreements as, 363
  conclusion of, 363
  duress, invalidity for, 250–251, 363
  enforcement of, 392–399
  extradition. *See under* Extradition
  general conventions, practice as to, 368–371
  generally recognized rules of international law, and, 12–13, 106–107, 315–317, 336–345
  imposed on defeated Power, 363–419
  individuals, rights of, under, 9–10, 698–699
  interpretation of, 399–433
  —agencies of, 399–403
  —*clara non indigent interpretatione*, 415
  —comparison with other parts of treaty, 418–419
  —context, by, 403–405
  —*contra proferentem*, 429
  —deduction *a contrario*, 405–406
  —*expressio unius est exclusio alterius*, 429
  —*expressio unius non est exclusio alterius*, 423–426
  —function of, 415
  —*generalia specialibus non derogant*, 177
Treaties—*continued*
  interpretation of—*continued*
  —good faith, 407–408
  —*in claris non fit interpretatio*, 415
  —intention of the parties, 420
  —languages of text, comparison of, 408, 429–430
  —literal, 427–429
  —ministerial letter, 400–402
  —necessity for, 415
  —parliamentary debates, 411–413, 431–433
  —preparatory work, 409–410, 411, 420–422, 429, 431–433
  —" reasonable meaning ", 417–418
  —*reductio ad absurdum*, 426
  —restrictive, 426
  —rules of, 403–429
  —" sense of the words ", 415–416
  —" spirit of the treaty ", 419–426
  kinds of, 361–363
  language of text of, 408, 429–430
  most-favoured-nation clause, 433–435
  municipal law and, 11–14, 393–395, 398–399
  municipal legislation, necessity for, 398
  not freely negotiated, 363, 419
  operation of, 392–399
  outbreak of war, effect of, on, 499–508
  —multilateral treaties, 506–507
  private law matter, concerning, 1–3
  provisional agreements, 361–363
  ratification, need for, 361–363, 392–393, 395
  reservations to, 364–392
  —" compatibility " of, 371, 384–388
  —consent of other parties, need for, 371–373, 384, 392
  —effect of, on other parties, 373–374
  —history of, 377–380
  —objections to, 365–366, 367–368
  — —before ratification, 374–376
  —practice as to, 380–383
  supremacy over treaties of—
  —prior municipal law, 393–395
  —subsequent municipal law, 369–398, 434–435
  termination of war and, 499–508
  time limits in, 427

Treaties of peace, 435–440. *See also under* Peace Treaty
  Order based on, interpretation of, 440
  reparations clauses in, 414–429
  —" injury or damage as result of war ", 414–423
  —municipal legislation, satisfaction by, 435–439
  —restitution of requisitioned property, 423–426, 435–440
  —time limit for claims, 427–429
Trianon, Treaty of (1920), Rome Agreements under (1923), 2
Trieste, Free Territory of—
  Permanent Statute, 81, 82
  status of, 81–84
Tripoli, status of, 77–78
Trucial States, Continental Shelf Proclamations (1949), 146, 154
Tunis, status of, 51–52
Turkey, Extradition Treaty with Germany (1930), 339

U

Union of American Republics, Pan-American Union and, 441–443
Union of Soviet Socialist Republics—
  Latvia, annexation of, 49–50, 61–64, 251, 288–289
  Lithuania, annexation of, 79–80
United Nations—
  conventions and, 389
  " nationals of the United Nations ", 55–56
  officials of. *See* International officials
  Secretary-General—
  —Memorandum on High Seas (1950), 158
  —powers of, as to officials, 450–456
  —Report on reservations to treaties (1950), 372, 379–380, 382
  Specialized Agencies of, 444–446
United States of America—
  Austria, Treaties with (1829), 502 ; (1947), 9
  Basic Field Manual, 644
  Bremen, Treaty with (1827), 500–501, 504, 505
  Civil Affairs Manual, 603, 644, 647
  Constitution, 266, 272, 274
  Continental Shelf Proclamation (1945), 152, 153
United States of America—*continued*
  Federal Tort Claims Act, 549, 550, 552, 553, 555, 557
  Fisheries Proclamation (1945), 114, 152, 153
  Germany, Treaties with (1921), 503, 505 ; (1923), 504
  Great Britain, Treaties with (1818), 118 ; (1931), 339
  International Organizations Immunities Act, 444–445, 447–448
  Italy, Treaty with (1868), 320
  Latvia, Treaty of Friendship with, 63
  Nationality Act (1940), 268, 269, 272, 273
  Okinawa and, 549–558
  Prussia, Treaties with (1799), 503 ; (1828), 500, 503, 504, 505
  Rules of Land Warfare, 318, 485, 591, 596
  trading with the enemy legislation, 482, 486, 491, 494, 496, 498, 499, 513–514, 516–520, 566, 649, 650, 651, 652
Universal Declaration of Human Rights (1948), 259, 342
Upper Silesia, severance from German Reich, 49, 67–69

V

Venezuela, Treaty with Great Britain (1942), 152
Versailles, Treaty of (1919), Arts. 100–108 (Danzig), 258, 400–401, 499, 503, 504, 505

W

War—
  aggressive, 592–595
  belligerent forces, 474
  co-belligerency, 426, 473
  definition of, 473, 723
  hostilities, termination of, 545–549
  laws of—
  —binding force of, 532
  —enforcement of, 532–544, 678–679
  outbreak of, effect of, on—
  —contracts, 509, 521–528
  —copyright agreements, 24–36
  —enemy property, 513–516
  —enemy subjects, 509–516
  —nationality, 507–508
  —neutral property, 516–520, 529

War—*continued*
  outbreak of, effect of, on—*continued*
    —right of enemy Government to sue, 493–498
    —statutes of limitation, 474, 477–493
    —treaties, 499–508
  prisoners of. *See* Prisoners of war
  resistance movements, 474
  state of, recognition of State and, 244–246
  termination of, 474, 486, 545–549
    —belligerent rights and, 711–712
  war risks, meaning of, 473
War crimes—
  courts, jurisdiction of, 12–13
  crimes against humanity and, 538–544
  definition of, 539–540
  extradition for, 331
  offence against member of same forces, 532–533
  prisoners of war, execution of, 533–535
  prisoners, killing of, 536–538
  punishment of, 532–544
  second trial for, 543
  self-preservation, defence of, 536–537
  superior orders, defence of, 532–538
  war criminals, right to treatment as prisoners of war, 544
Workmen's Compensation Convention (1925), 506–507
World Health Organization—
  Constitution, 380
  Staff Regulations, 468

Y

Yugoslavia—
  Constitution, 227
  Italian occupation of, 621–625

Z

Zanzibar, status of, 54–55

LONDIN.
UNIV.

PRINTED BY R. & R. CLARK, LTD., EDINBURGH